



NORTH ATLANTIC MILITARY COMMITTEE  
COMITE MILITAIRE DE L'ATLANTIQUE NORD

MCM-76 -77  
31 October 1977

MEMORANDUM FOR THE SECRETARY GENERAL, NORTH ATLANTIC TREATY ORGANISATION  
SUBJECT: HUMANITARIAN LAW - REVIEW OF ARTICLES 35-60 OF PROTOCOL I

Background

1. A mandate(1) by the North Atlantic Council calls for a Military Committee examination of the military implications of paragraphs 33 through 53, of the 1st Additional Protocol to the Geneva Conventions of 12 August 1949 (Protocol I). The Protocol was developed by the Diplomatic Conference on Re-affirmation and Development of International Humanitarian Law applicable in armed conflicts, which met in four sessions in Geneva in the period 1974-1977. Protocol I deals with international armed conflicts including, under terms of Article 1 of the Protocol, certain categories of national liberation struggles. In the final stages of the Diplomatic Conference, the articles of Protocol I were revised and re-numbered. In this paper they are therefore addressed in accordance with the final numbering.

Scope of Military Study

2. The articles reviewed by the Military Committee (Numbers 35 - 60 inclusive) fall into the following categories:

- a. Part III - Methods and Means of Warfare  
Combatant and Prisoner of War Status.

INCORPORATED  
Corr 1

Section I - Methods and Means of Warfare

- Article 35 - Basic Rules
- Article 36 - New Weapons
- Article 37 - Prohibition of Perfidy
- Article 38 - Recognised Emblems
- Article 39 - Emblems of Nationality
- Article 40 - Quarter
- Article 41 - Safeguard of an enemy hors de combat
- Article 42 - Occupants of aircraft

Section II - Combatant and Prisoner of War Status

- Article 43 - Armed Forces
- Article 44 - Combatant and Prisoners of War
- Article 45 - Protection of Persons who have taken part in hostilities
- Article 46 - Spies
- Article 47 - Mercenaries

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- b. Part IV - Civilian Population
- Section I - General protection against effects of hostilities
    - Article 48 - Basic Rule
    - Article 49 - Definition of attacks and scope of application
    - Article 50 - Definition of civilians and civilian population
    - Article 51 - Protection of the civilian population
    - Article 52 - General protection of civilian objects
    - Article 53 - Protection of cultural objects and of places of worship
    - Article 54 - Protection of objects indispensable to the survival of the civilian population
    - Article 55 - Protection of the natural environment
    - Article 56 - Protection of works and installations containing dangerous forces
    - Article 57 - Precautions in attack
    - Article 58 - Precautions against the effects of attacks
    - Article 59 - Non-defended localities
    - Article 60 - Demilitarized zones

Aim

3. The aim is to determine the military implications, for the Alliance, including the effects for future defence capability, of Articles 35 - 60 inclusive, as listed above.

Factors taken into account

4. In the conduct of the study, the following factors have been taken into account in the examination of each Article.

a. Whether the article is readily comprehensible in military terms, and whether it gives scope for more than one reasonable interpretation.

b. Whether the article is readily translatable, without distortion or ambiguity, into the simple, straight-forward instructions which, when the Protocol is ratified, will necessarily be required in military manuals.

c. Whether the rules laid down are capable of practical application in field conditions.



d. Whether the rules are enforceable by commanders in the field in the light of conditions in the field.

e. Whether <sup>application</sup> ~~implication~~ of the rules as drafted would inhibit Allied operational capability.

Review

5. The articles listed have been examined individually in the Enclosure to this paper. In each case, the text of the article is repeated for ease of reference. These articles must be read in conjunction with the record of the Conference and the declarations and statements of understanding made by the Allied Nations. Where appropriate, these qualifications have been taken into account in framing the military observations on each of the articles under review.

Coordination within the Alliance

6. The Military Committee has previously emphasized(1) that the existence of different rules for commanders of different nationalities (or even different National Government attitudes) could pose substantial difficulties in certain circumstances. A field commander (ground or air or joint), himself a member of a state which has placed on record an interpretation on implementation of a particular article or articles, could command in war forces of other states or could be responsible for launching attacks from the territory of other states which have not so deposed. Such a commander could order military action which would be contrary to national policies or rules of his subordinate commanders or of the state on the territory of which he is fighting. Conversely, a field commander of a nation which has not qualified its observance of an article in any way, could be constrained in ordering or approving legitimate military action by a subordinate commander of a nation which has qualified its position viz-a-viz the article. It is of high military importance, therefore, that the member states of the Alliance adopt a common position on interpretation of each article and on any required interpretations.

Reprisals

7. It is noted reprisals are forbidden by various articles of the Protocol. They do not affect NATO defence planning, but remain a matter for National Governments. They are not considered further in this paper. It is,

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(1) MCM-89-76, para. 27

however, foreseen that consultation may be necessary in other fora within the Alliance, to coordinate National attitudes on this important issue.

Nuclear Aspects

8. It is an essential element of the Allied strategy and essential to Allied military security that the options to use nuclear weapons be retained. There are certain articles (notably Articles 35, 51 and 55) which would inhibit essential uses of nuclear weapons, if they were held to apply to nuclear weapons.

This crucial issue is fully appreciated throughout the Alliance and all the Allies accept that the articles of Protocol I shall not affect the use of nuclear weapons. An understanding to this effect, presented by some Allied Nations, appears in the record of the Conference. It is necessary that all Allies, fully seized of the essentiality of nuclear weapons to Allied defence and security, will underwrite this recorded understanding. The military observations on individual articles under review have therefore been based on the understanding that the rules introduced by the Protocol do not affect the use of nuclear weapons, and that member states of the Alliance will coordinate and consult to ensure that their national positions are in harmony and that this understanding shall be legally effective throughout the Alliance.

Application to Conventional Warfare

9. The delegations of NATO member countries at the Geneva Conference have clearly sought, with a very high degree of success, to so frame the rules that they should not inhibit legitimate and necessary Allied military activity. Where this criterion has not been fully met in the wording of the Articles themselves, individual Allied Nations have placed on record interpretations or statements of understanding designed to protect those Allied interests.

10. From the military point of view, the Articles under review (35 - 60), qualified and interpreted in accordance with the interpretations recorded by some Allied nations, would be acceptable militarily. It is stressed that this finding depends to a great extent on the primacy of the definition, included in Article 52 of the Protocol, of a military objective, viz :-

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"In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".

That definition is satisfactory and comprehensive. Furthermore, doubts which might have existed in some quarters that this definition could exclude certain legitimate targets or methods and means of combat have been resolved by the understanding recorded by some Allies at Geneva that in certain circumstances an area of land may be a legitimate military objective.

11. The military findings on Articles 35 - 60 record in each case whether the article is militarily acceptable, taken alone or in conjunction with reservations, or statements of interpretation or understanding placed on record by Allied Nations. In several cases, the qualifications are considered militarily essential, viz :-

- a. Article 35 - Basic Rules
- b. Article 41 - Safeguard of an enemy hors de combat
- c. Article 44 - Combatants and Prisoners of War
- d. Article 50 - Definition of Civilians and Civilian Population
- e. Article 51 - Protection of the Civilian Population
- f. Article 52 - General Protection of Civilian Objects
- g. Article 53 - Protection of Cultural Objects and of Places of Worship
- h. Article 57 - Precautions in Attack
- j. Article 58 - Precautions against the Effects of Attacks.

12. It is considered of critical military importance, for the reasons set out in paragraph 6 of this report, that all Allied member states which adhere to the Protocol should endorse the qualifications and interpretations listed at paragraph 11 and should take such measures as may be appropriate to make them legally effective.

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13. Should it be found, in political and legal examination subsequent to this military review that from the political and/or legal viewpoints there is doubt within any nation of the Alliance as to the validity of the military interpretations of the articles under consideration qualified and interpreted as recorded in the review of individual articles in this review, or any doubt that the qualification and interpretations are sufficient to retain, for the Alliance, essential military options and capabilities, further military review will be required of the articles on which such doubts may arise. It is stressed, however, that from the military point of view, the articles, qualified by the reservations, or statements of interpretation or of understanding placed on record by some Allied Nations, are regarded as satisfactory for military purposes, and do not place essential military options or capabilities at risk.

In their present form, they are adaptable to framing of military regulations which will be readily assimilable and capable of implementation in war.

Findings

14. It is considered that :-

a. It is essential, for the security of the Alliance, that all the Allies endorse the position already taken by some Allies in Geneva, that the Protocol does not affect the use of nuclear weapons : and that this understanding shall be legally effective throughout the Alliance. (See paragraph 8 above).

b. It is similarly militarily essential that, in applying the Protocol, all concerned member Nations of the Alliance adopt the same interpretation and make that interpretation legally effective.

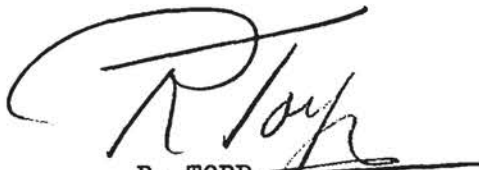
c. The findings of this military review do not prejudice content, wording and nature of statements or reservations to be made nor the modalities of their implementation. These must be decided upon by national authorities and, so far as the Alliance is concerned, considered by the appropriate political fora of the Alliance.



d. The specific articles on which interpretations could vary and on which co-ordination is required under b. above, are listed at paragraph 11 above.

e. Consultation may be necessary within the Alliance, to co-ordinate National attitudes on reprisals, as indicated at paragraph 7 above.

FOR THE MILITARY COMMITTEE



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ENCLOSURE TO  
MCM-76 -77

HUMANITARIAN LAW - REVIEW OF ARTICLES 35 - 60 OF PROTOCOL I

THIS ENCLOSURE EXAMINES ARTICLES 35 - 60  
OF PROTOCOL I INDIVIDUALLY

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-1- This Enclosure consists of 71 pages,  
plus  
Annex 1 of 38 pages  
Annex 2 of 4 pages

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PART III

METHODS AND MEANS OF WARFARE  
COMBATANT AND PRISONER OF WAR STATUS

SECTION I

METHODS AND MEANS OF WARFARE

ARTICLE 35 - BASIC RULES

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

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

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

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ARTICLE 35 - BASIC RULES

Interpretation

1. Paragraph 1 of Article 35 is a re-statement or reminder of the existing rules. The difference<sup>s</sup> in language, as compared with the original rules, have no substantial effect. Paragraph 2 is based on the existing provisions of the 1899 and 1907 Hague Regulations which at Article 23<sup>e</sup>. provide that ... "Il est notamment interdit ... d'employer des armes, des projectiles ou des matières propres à causer des maux superflus".

Paragraph 3 is a new rule.

Military Observations

2. Paragraphs 1 and 2 of Article 35 are essentially the same as the existing rules.

3. Paragraph 3 derives from and is similar to Article 55. It is designed to prevent "widespread, long-term and severe damage to the natural environment" and, is a new requirement. The use of the words "widespread, long-term and severe" was discussed in Committee III at Geneva. They are to be taken as referring to damage measured in decades, and more severe than that caused to World War I battlefields. The Article is thus directed to such damages as would be likely to prejudice over a long term, the continued survival of the civilian population or would risk causing it major health problems. This rule would not inhibit the use of conventional high-explosive weapons nor existing methods and means of employing those munitions except, possibly, where the use of such conventional munitions on a target released other dangerous forces such as nuclear or flood-water. Those special targets are the subject of a separate article.

4. Paragraph 3 of Article 35 could prevent the use of certain types of nuclear weapons but application of the Protocol to the use of nuclear weapons is specifically excluded by a declaration made by some member states of the North Atlantic Council in Geneva.

Finding

5. Article 35 would not inhibit Allied military operations and would be acceptable militarily, subject to acceptance by member states of the Alliance that the Protocol is not applicable to use of nuclear weapons and to arrangements being made by these states to make that position legally effective.



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ARTICLE 36 - NEW WEAPONS

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

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ARTICLE 36 - NEW WEAPONS

Interpretation

1. This article requires States & Governments to determine whether a new weapon, means or method of warfare would be in breach of a rule. It does not, in itself, prohibit or inhibit development nor, in itself, prohibit employment. This article codifies customary international law.

Finding

2. Article 36 is militarily acceptable.

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ARTICLE 37 - PROHIBITION OF PERFIDY

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

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender.
- (b) the feigning of an incapacitation by wounds or sickness.
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law, applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and mis-information.

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ARTICLE 37 - PROHIBITION OF PERFIDY

Interpretation

1. Perfidy is already forbidden by the law of war. (Hague Regulations Articles 23b. and 24). This Article defines the existing Hague and customary law prohibition more precisely, and clarifies its meaning and the scope of its application.

Military Observations

2. In general, the Article would not inhibit military commanders or military operations. It reflects current rules and practice.

Finding

3. Article 37 is militarily acceptable.

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ARTICLE 38 - RECOGNISED EMBLEMS

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognised protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorised by that Organisation.

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ARTICLE 38 - RECOGNISED EMBLEMS

Interpretation

1. Article 38 is in line with existing regulations (Articles 42 and 44 of the First Geneva Convention) and Allied practices. It extends the existing rules to include protective emblems provided for in the Protocol for civil defence (Article 67) and installations containing dangerous forces (e.g. nuclear power stations). It also forbids improper use of the United Nations' emblem.

Military Observations

2. There would be no military objection to the measures required by this Article.

Finding

3. Article 38 is militarily acceptable.

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ARTICLE 39 - EMBLEMS OF NATIONALITY

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this article or in article 37, paragraph 1 (d), shall affect the existing generally recognised rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

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ARTICLE 39 - EMBLEMS OF NATIONALITY

Interpretation

1. This article is in line with existing rules in Article 23(f) of the Hague Regulations of 1907, except that it extends the rule to prohibit the use of enemy or neutral military uniforms, and clarifies <sup>an</sup> ~~as~~ aspect of law (concerning wearing of these uniforms) on which there has hitherto been some dispute.

Military Observations

2. Use of enemy or neutral military uniforms has hitherto been regarded as a legitimate ruse of war. In practice, however, it has rarely been used. It is considered that the prohibition would not significantly affect the Allies' defence capability.

Finding

3. Article 39 is considered acceptable militarily.

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ARTICLE 40 - QUARTER

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

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ARTICLE 40 - QUARTER

Interpretation

1. This article repeats the existing law on this subject, contained in Hague Regulations Article 23(d).

Military Observations

2. No military objection.

Finding

3. This article is militarily acceptable.

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ARTICLE 41 - SAFEGUARD OF AN ENEMY HORS DE COMBAT

1. A person who is recognised or who, in the circumstances, should be recognised to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if :-

a. he is in the power of an adverse Party.

b. he clearly expresses an intention to surrender; or

c. he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

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ARTICLE 41 - SAFEGUARD OF AN ENEMY HORS DE COMBAT

Interpretation

1. The rules in paragraphs 1 and 2 are clearly worded and unambiguous. They reaffirm Hague Regulations, Article 23(c).

2. Paragraph 3 refers to the Third Convention, Part III, Section I. The paragraph reaffirms Article 19 of the Third Geneva Convention. This, so far as evacuation is concerned, requires that prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. Only prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Military Observations

3. Essentially, this article clarifies an existing law on evacuation of prisoners of war, and additionally, requires the captor, in releasing prisoners of war in a combat zone, to take all "feasible precautions to ensure their safety", i.e. to do what he can in those conditions.

4. The article applies only to special circumstances, i.e. long-range patrols or Commando raids where there is no ability to handle prisoners of war in accordance with Prisoner of War Convention.

The obligation placed on commanders to take "feasible precautions" is limited to doing what is practicable in the circumstances. In the light of this, the article is not objectionable nor inhibiting militarily.

Finding

5. This article is militarily acceptable, subject to the interpretation (1) of "feasible" given under Article 57 being established, namely, that which is practicable or practically possible, taking into account all the circumstances ruling at the time, including those relevant to the success of military operations.

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(1) For ease of reference, the understanding recorded in Article 57 is that "feasible" refers to that which is practical or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations.



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ARTICLE 42 - OCCUPANTS OF AIRCRAFT

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

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ARTICLE 42 - OCCUPANTS OF AIRCRAFT

Interpretation

1. There are no identifiable ambiguities in the wording of this article.

Military Observations

2. A rule prohibiting attack on persons (other than airborne troops or paratroops) parachuting from aircraft in distress during their descent would be satisfactory, indeed desirable, militarily. The practice is already observed by Allied Nations, as existing law (an interpretation of Hague Regulations, Article 23(c)).

Finding

3. Article 42 is militarily acceptable and indeed desirable.

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SECTION II

COMBATANT AND PRISONER-OF-WAR STATUS

ARTICLE 43 - ARMED FORCES

1. The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a Government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

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ARTICLE 43 - ARMED FORCES

Interpretation

1. This article establishes the definition, in the context of the Convention and the Protocol, for armed forces of parties to a conflict; it requires that such armed forces be under a command responsible to that party and that armed forces be subject to an internal disciplinary system.

Military Observations

2. This article codifies rules which set out clearly how armed forces should be controlled, to whom they shall be responsible, and by whom discipline shall be exerted. It would not accord recognition as "armed forces" to dissident or guerilla formations which were not under a command responsible to a party to a conflict. It is to be read in conjunction with Article 1.

Finding

3. Militarily, Article 43 is useful and indeed desirable.

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ENCLOSURE to

MCM-76-277-77



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ARTICLE 44 - COMBATANTS AND PRISONERS OF WAR

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflicts, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

a. during each military engagement, and

b. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3, shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

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6. This article is without prejudice to the right of any person to be a prisoner of war pursuant to article 4 of the Third Convention.

7. This article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

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ARTICLE 44 - COMBATANTS AND PRISONERS OF WAR

Interpretation

1. This article introduces a new category of prisoner of war, namely those combatants who, although not wearing the uniform or insignia of the regular armed forces of a party to a conflict, are nevertheless recognised as members of the armed forces under command and military discipline of a party to the conflict.

2. The right of such combatants to be treated as prisoners of war is established in Article 44, paragraph 1. Paragraph 2 rules that violations of international law shall not deprive a combatant of his right to be a prisoner of war.

Military Observations

3. Paragraph 3 offers potential difficulty in that, recognising that in some special circumstances an irregular combatant (e.g. a member of a resistance movement under a command responsible to a party to the conflict) may not be able always to distinguish himself clearly as a combatant, the Article seeks in these circumstances to relate identification as a combatant with his carrying arms openly, both during a military engagement and while visible to the adversary during deployment preceding the launching of an attack. A combatant who fulfils those two conditions will be treated, if captured, as a prisoner of war.

4. There could be considerable practical difficulty in applying paragraph 3, to determine whether a man in civilian dress, captured in combat, had carried his arms openly while engaged in a military deployment preceding the launching of an attack in which he is to participate. Civilian-clad loungers on a street corner could, for example, produce concealed arms and fire on a patrol: and might then justifiably claim that they had not contravened either of the two conditions in paragraph 3 a. and b. of the article. Such circumstances, and many other conceivable scenarios in which irregulars in civilian dress could abuse the article, could well create an atmosphere in which troops took no risks and in which unarmed civilians might be put at greater peril than would be incurred if the rule did not exist.

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5. It is noted, however, that some Allied Nations have recorded at Geneva an understanding that :-

- the first sentence in Article 44, paragraph 3 restates the generally recognised rule of distinction, which means that combatants have to distinguish themselves from the civilian population in a clearly recognisable manner.

- the situations described in the second sentence of paragraph 3 of Article 44 can in the NATO context exist only in occupied territory, in which territory armed forces of the occupying power would be constantly on the alert for armed resistance action.

- combatants who fail to meet the minimum requirements of the second sentence of paragraph 3 of the Article, forfeit their combatant status and entitlement to be prisoner of war, and may be treated and punished accordingly.

6. These Nations have also recorded an understanding that the word "deployment" must be interpreted as meaning any movement towards a place from which an attack is to be launched.

7. Certain delegations from other regional groups at Geneva have, however, expressed contrary views. The article can only be considered militarily acceptable, if the Allied nations accept the interpretation referred to in paragraph 5 and 6 above.

#### Finding

8. Article 44 is militarily acceptable, subject to the following interpretations being established, and made legally effective :-

a. The situation described in the second sentence of paragraph 3 of the article can only exist in occupied territory., in the NATO context(1).

b. The word "deployment" in paragraph 3b. of the article means "any movement towards a place from which an attack is to be launched".

c. Failure to meet the requirements of the second sentence of paragraph 3 of the Article results in forfeiture of combatant status and the loss of entitlement to be a prisoner of war.

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(1) It is recognised that, in contexts other than NATO, the situation described in the second sentence of para. 3 of Article 44 may exist in the circumstances described in para. 4 of Article 1 of the Protocol. This will necessarily be taken into account by National authorities in making the finding at 8a. legally effective.



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ARTICLE 45 - PROTECTION OF PERSONS WHO HAVE TAKEN PART IN HOSTILITIES

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power, or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

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ARTICLE 45 - PROTECTION OF PERSONS WHO HAVE TAKEN PART IN HOSTILITIES

Interpretation

1. This article is unambiguous. It extends the provision contained in Article 5 of the Third Geneva Convention (Prisoners of War) concerning the determination of prisoner of war status. It also amends Article 5 of the Fourth Geneva Convention (Civilians) by permitting a person (other than a spy) detained in occupied territory to retain his rights of communication under that convention.

Military Observations and Finding

2. Acceptable.

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ARTICLE 46 - SPIES

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

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ARTICLE 46 - SPIES

Interpretation

1. Paragraphs 1 and 2 are straightforward. The term "espionage" as used in paragraph 1 means spying as defined in Article 29 of the 1907 Hague Regulations: namely, obtaining or endeavouring to obtain, by clandestine means, or by false pretences, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

2. Paragraph 3 is difficult to interpret. Presumably the intention behind the first part of the paragraph is to prevent an unscrupulous authority from exploiting paragraph 2 by treating members of the enemy armed forces in occupied territory (and presumably out of uniform on that account) as spies on flimsy or no evidence. The last sentence of the paragraph would ensure that a spy who had been identified but not made prisoner at the time and who had subsequently been taken, would not forfeit his entitlement to prisoner of war status on account of the earlier identification as a spy.

3. Paragraph 4 would have the same effect as paragraph 3 for members of the armed forces who have not been overrun by an occupying force but are subsequently captured. It reaffirms the existing law.

4. The effect of this article, taken as a whole, is to extend the provisions of the Hague Regulations Articles 29 - 31 (which cover regular forces) to irregular fighters who belong to resistance movements and similar bodies of the armed forces.

5. It is noted that the article restricts the application of the article to those who "gather or attempt to gather information". It would apparently still remain open to the occupying power to enact an occupation law making the transmission of information a punishable offence.

Military Observations

6. The proposed article would not be operationally inhibiting.

Finding

7. Article 46 is acceptable militarily.

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ARTICLE 47 - MERCENARIES

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who :-

a. is specially recruited locally or abroad in order to fight in an armed conflict.

b. does, in fact, take a direct part in the hostilities.

c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party.

d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.

e. is not a member of the armed forces of a Party to the conflict; and

f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

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ARTICLE 47 - MERCENARIES

Interpretation

1. Article 47 gives to a captor the discretion to decide whether a "mercenary" should be treated as a combatant and be entitled to be a prisoner of war. A "mercenary", as defined in the Article, would NOT have the right to be combatant or a prisoner of war, but could be accorded that status if the Party to the conflict capturing him so desired.

2. The Article then defines a "mercenary" in such a way as to exclude any member of the armed forces of a Party to the conflict, or of any state and sent by that state. This effectively prevents observers or advisers who are members of armed forces of states other than those engaged in hostilities being classified as mercenaries.

3. Paragraph 2 provides additional safeguards. All the conditions in 2(a) through (e) must be satisfied before a prisoner is considered a mercenary.

Military Observations

4. There would be no risk, for member Nations of the Alliance, that members of their armed forces, or members of other Nations' armed forces attended as advisers or observers, would be classified as mercenaries.

5. In fact, it is difficult to envisage where mercenaries, in the terms of the definition of the Article, could be employed in international wars except in wars between under-developed nations.

Finding

6. Article 47 is militarily acceptable.

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PART IV

CIVILIAN POPULATION

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SECTION I

GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER I

BASIC RULE AND FIELD OF APPLICATION

ARTICLE 48 - , BASIC RULE

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

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ARTICLE 48 - BASIC RULES

Interpretation

1. The intent of this article is clear. Ambiguity lies in the impression, which may be conveyed by the wording, that "civilian objects" and "military objectives" are always mutually exclusive. It is, however, clear from other articles, particularly Article 52, that a "civilian object" may become a "military objective". The last phrase of the article could also be misinterpreted as implying that only objects, not persons, may be attacked. It is, however, clear from existing laws (e.g. the St. Petersburg Declaration) and other articles of the Protocol that enemy combatants, and enemy civilians if they take a direct part in hostilities (Article 51, paragraph 3) are legitimate targets.

Military Observations

2. It is noted (see Article 52) that "In so far as objects are concerned, military objectives are limited to those objects which by their own nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time, offers a definite military advantage". That definition meets military requirements.

Finding

3. Article 48 is acceptable militarily.

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ARTICLE 49 - DEFINITION OF ATTACKS AND SCOPE OF APPLICATION

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

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ARTICLE 49 - DEFINITION OF ATTACKS AND SCOPE OF APPLICATION

Interpretation

1. This article defines the field of application of Section I of Part IV (Civilian Population - General Protection Against Effects of Hostilities). In effect, Articles 48 through 60 discussed in this paper, shall operate to protect civilian population and individual civilians on land, or civilian objects on land.

2. The article restricts application of the Protocol to civilians and civilian objects on land. It excludes application of this section of the Protocol in the following situations :-

- air to air
- air to sea
- sea to air
- land to sea
- sea to sea

The article notes that this section of the Protocol protecting civilians shall apply to all attacks from the sea or the air against objectives on land, but does not otherwise affect existing generally recognised rules of international law applicable to armed conflict at sea or in the air.

Military Observations

3. The article does not in itself contain any rules for the conduct of military operations. In defining the scope of the section of the Protocol and confining the application of that section to objectives on land, it is sensible and consistent with the existing policies and practices of Allied Nations.

Finding

4. Article 49 is acceptable militarily.

CHAPTER II

CIVILIANS AND CIVILIAN POPULATION

ARTICLE 50 - DEFINITION OF CIVILIANS AND CIVILIAN POPULATION

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.



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ARTICLE 50 - DEFINITION OF CIVILIANS AND CIVILIAN POPULATION

Interpretation

1. The intention is clear - anyone who is not a member of the armed forces, as defined in Article 43, is a civilian. However, the understanding which relates to Articles 51 and 57 - that commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time - also applies to this article.

Military Observations

2. This article leaves no doubt as to the qualification for military or civilian status.

Finding

3. Article 50 is militarily acceptable, subject to the following understanding :-

Military Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

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ARTICLE 51 - PROTECTION OF THE CIVILIAN POPULATION

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:-

a. those which are not directed at a specific military objective.

b. those which employ a method or means of combat which cannot be directed at a specific military objective; or

c. those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate :-

a. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

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

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7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular, in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

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ARTICLE 51 - PROTECTION OF THE CIVILIAN POPULATION

Interpretation

1. This article :-

a. sets down the rule that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.

b. specifies that the civilian population, as such, as well as individual civilians, shall not be the object of attack.

c. prohibits acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.

d. prohibits indiscriminate attacks and defines indiscriminate attacks.

General Rules

2. The general protection afforded to civilians by this article is in accordance with current law and Allies' practices.

3. Civilians who take a direct part in hostilities will not be protected from attack, while doing so.

4. These rules would prohibit attack on civilians, either in concentrations or as individuals except those civilians taking a direct part in hostilities. This is a question of fact, thus civilians bearing arms as part of a military operation or engaged in sabotage are clearly taking a direct part in hostilities, while civilians manning a military supply column or a military stores depot may not be. However, such targets are clearly legitimate military objectives and it is clearly established in other elements of the rules that military objectives may be attacked by any legitimate munitions or means whether or not civilians are present. Such civilians are not protected against the incidental effects of these attacks.

Indiscriminate attacks

5. Paragraph 4 of Article 51 prohibits indiscriminate attacks, defining these as attacks not directed at a specific military objective, or



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those which employ a method or means of combat which cannot be directed at a specific military objective, or the effects of which cannot be limited as required by the Protocol and consequently are of a nature to strike military objectives and civilians or civilian objects without distinction.

6. Three forms of attack would be prohibited :-

a. attacks not directed at a specific military objective.

b. attacks by methods or means of combat which cannot be directed at a specific military objective.

c. attacks, the effect of which cannot be limited as required by the Protocol and consequently are of a nature to strike military objectives and civilian objects without distinction.

7. The prohibition at paragraph 6a. above requires attacks to be directed at specific military objectives. The prohibition at paragraph 6b. bans any weapon or method which cannot be so directed. Taken together, they restrict the choice of targets to military objectives: this is in accordance with NATO doctrine and has no inhibiting implications provided that the expression "military objective" is satisfactorily defined.

It has been mooted that the rules at 6a. and b. could be interpreted in such a way as to prohibit the use, for example, of mines, area fire, harassing fire or unobserved artillery fire on the basis that such attacks would not be or could not be directed at specific military objectives.

It might be argued that such uses, when directed against an area where there is only a possibility that the enemy intend to occupy or use the area, would not be directed against a specific military objective. That interpretation would place serious restrictions on military capability (e.g. it could apply in the laying of land mines by a Nation on its own territory).

However, taking the article as it now stands, and bearing in mind the qualification already made, it is noted that :-

a. Methods or means of warfare can always be directed, and are directed, against a military objective. An area of land would only be subjected to such methods and means of warfare where, in the considered judgment of the commander, it may make an effective contribution to enemy action.

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b. At Geneva, some Allied delegations made an interpretative declaration, related to "military objective" (as defined in Article 52) which provides that an object may by its nature or location or purpose or use make an effective contribution to (enemy) military action. This declaration specifies that a specific area of land may be a military objective, if, because of its location or other reasons specified in Article 52, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

In the military view, the article, as thus qualified, would not inhibit essential military uses of the methods or means of warfare listed above (mines; area fire, harassing fire; unobserved artillery fire). An area of land would clearly not be excluded from the category of objects which, by their nature or location may offer legitimate military targets where, in circumstances ruling at the time, their total or partial destruction, capture or neutralization offers a definite military advantage. It would be contrary to the practicalities and lessons of the long history of warfare to maintain that an area of land is immune from capture or neutralization; the seizure and control of land areas are crucial and essential to the conduct of war and to the objectives and tasks of armies and of Nations at war. In the context of the Protocol, an area of land would only be attacked in order to capture or neutralize it - the latter in the sense of denying its use to the enemy. The total or partial destruction of an area of land, per se, is not a practical nor conceivable objective nor an achievable aim in conventional warfare.

It is stressed that this interpretation, i.e. that an area of land may be a military objective and therefore may be attacked as such, is an essential military requirement. If this were not so, there would be a substantial restriction on the options available to Allied commanders and a serious degradation of combat capability.

It is therefore militarily essential that this interpretation is accepted and made legally effective by all member states.

Land Mines

8. Special consideration has been given to land mines, because of doubts which have been voiced in some quarters as to whether this article could



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prohibit or restrict the use of land mines, on the grounds that land mines cannot be directed against a specific military target: and, if laid, may be exploded by and injure civilians (e.g. refugees) or others. It is considered that these doubts are unjustified for the following reasons :-

a. Land mines are laid for specific military purposes in areas where their presence will delay, disrupt or channel an enemy force, or neutralize/deny that area to enemy use. In the circumstances prevailing at the time and in the light of all information available to the responsible commander, they are clearly directed in two senses - both at the area and at an enemy military force.

b. The fact that civilians may cross a minefield and thereby suffer injury would not invalidate the fact that the mines had been properly directed. Any civilians so injured would suffer damage incidental to the purpose and that, in itself, as recognised elsewhere in the Protocol does not prohibit resort to available methods or means of warfare.

c. It is clear from the proceedings of the Geneva Conference that certain proposals for restriction of use of mines were considered separately: these proposals were referred to a further conference to be held not later than 1979. If Article 51 had been intended to forbid the use of mines, these proposals would have served no purpose. It is considered, therefore, that Article 51 was not intended, by the Conference, to have such overall effects.

d. If Article 51 had been intended to prohibit the use of land mines it would, for this reason alone, need to be worded in much more specific terms.

9. There is no doubt in the minds of the military staffs that, in the light of the above, Article 51 would not inhibit the laying of land mines for normal legitimate military purposes.

10. The prohibition at 6c. above is of a different nature. It relates to the effects of weapons in the context of the various Articles of the Protocol, e.g. 35, 54, 55 and 57 (Rule of Proportionality). This requires no further specific comment.

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Examples of Indiscriminate Attacks

11. Paragraph 5 of the article goes on to specify that the following type of attacks, among others unspecified, are to be considered as indiscriminate:-

a. An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and

b. An attack (see Article 57) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

12. The intention of this clause at 11a. above is clearly to avoid area bombing or bombardment of populated areas, per se. It would prohibit blanket bombardment but would not inhibit attacks against specific military objectives within a populated area. It would not prohibit simultaneous concentrated attack against two or more legitimate military objectives in such an area, if these military objectives were not clearly separate from each other. For example, a company of tanks moving into and about a town or village or similar concentration of civilians is not immune from attack even though, because of their movement or cover they cannot be attacked individually.

Rule of Proportionality

13. The clause at 5b. of the Article (see also Article 57) relates the expectation of civilian damage to the anticipated military advantage, and therefore clearly leaves the judgement to the military commander.

14. It is noted that some Allies have placed on record in Geneva an understanding that the military advantages anticipated from an attack are intended to refer to the advantages anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack. A further Allied understanding has placed on record that commanders must, of necessity, act on the information from all sources available to them at the relevant time. It is only on these understandings, which provide the necessary military latitude and protection from unjustifiably restrictive interpretation of this clause, that the commander's discretion would not be unduly inhibiting and that this section of the Article would be satisfactory in military terms.

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Use of Civilians as Shield

15. Paragraph 7 of the Article forbids the movement of the civilian population in order to shield support military operations. It should be read in conjunction with Articles 51(1) and (2) and Article 58 and is not inhibiting militarily.

Observance of Rules

16. Paragraph 8 of the Article - no military comment.

Finding

17. Article 51 is militarily acceptable, subject to the following interpretations being established :-

a. The military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

b. Military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

c. The definition of indiscriminate attacks contained in paragraph 4 of the Article does not mean that there are means of combat, or specific weapons, the use of which would constitute an indiscriminate attack in all circumstances. Provided a commander, in the light of all the information available to him at the time, is satisfied that a potential target is a military objective, he would not be inhibited by this definition from attacking it with means and weapons at his disposal, most suited to the circumstances and the target.

CHAPTER III

CIVILIAN OBJECTS

ARTICLE 52 - GENERAL PROTECTION OF CIVILIAN OBJECTS

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

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ARTICLE 52 - GENERAL PROTECTION OF CIVILIAN OBJECTS

Interpretation

1. Paragraph 2 provides a wide ranging definition of military objectives, limiting them only to those "objects which by their own nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage".

2. The range of military objectives thus defined is restricted only in two senses :-

- a. that they make an effective contribution to military action, and
- b. that attack on them offers a definite military advantage.

The discretion to make those judgements "in the circumstances ruling at the time" is clearly one to be exercised by the commander launching the attack. It is noted that the Allies have recorded in Geneva, an understanding that commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. That understanding provides the necessary military latitude.

3. However, the interpretation of the word "limited" could be the cause of some concern. If a "space" meaning were attributed to the word, this would impose restrictions on the use of certain weapons and on tactical employment of certain means, which by their nature, although directed at specific targets can affect rather large areas. Such an interpretation could lead to bans or limitations to engagement of area targets by air forces, artillery, rockets/missiles or naval fire; to harassing and barrage artillery fire. However, read in conjunction with Articles 50, 52 and 57, paragraph 2, a.(iii) it can only be interpreted as emphasizing the care to be used in directing attacks only against military objectives.



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4. It is noted in this connection that in Geneva, Allies have recorded an understanding that :

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 52, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The first sentence of Article 52, paragraph 2 prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.

5. Paragraph 3 deals with cases of doubt as to whether an object which is normally dedicated to civilian purposes, may be regarded as a military objective. It rules that, if there is doubt whether an object (e.g. a house or school) is being used to make an effective contribution to military action, it shall be presumed not to be so used. For military purposes, use would not necessarily mean occupation : for example, enemy troops, sheltering from direct fire behind a house or school would clearly be exploiting its existence and location for military purposes. The building in question would therefore be liable to attack as a military objective. Although there will be occasions when it will be difficult for a commander to determine whether a civilian object is being used to make an effective contribution to military action, in most such situations the object will, by virtue of its location, itself become a military objective.

#### Military Observations

6. Bearing in mind the understanding on interpretation and application of this article to which Allies have subscribed and which they have placed on record in Geneva, this article would not impose any significant operational restrictions.

#### Finding

7. Article 52 is militarily acceptable, subject to the following interpretations being established :-

a. A specific area of land may be a "military objective" if, because of its location or other reasons specified in Article 52, its total

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or partial destruction, capture or neutralization in the circumstances ruling at the time, offers definite military advantage.

b. The first sentence of Paragraph 2 of Article 52 prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.

c. Military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information, from all sources which is available to them at the relevant time.

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ARTICLE 53 - PROTECTION OF CULTURAL OBJECTS AND OF PLACES OF WORSHIP

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited :-

a. to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

b. to use such objects in support of the military effort.

c. to make such objects the object of reprisals.

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ARTICLE 53 - PROTECTION OF CULTURAL OBJECTS AND OF PLACES OF WORSHIP

Interpretation

1. This article prohibits attack directed at cultural objects. It also prohibits use of such objects in support of the military effort.

Military Observations

2. It does not supersede, for those States which are parties thereto, the relevant provisions of the Hague Convention for the Protection of Cultural Property. This recognises in Article 11(2) that the imperative military necessity may require attacks to be made on cultural objects, and also provides in Article 11(1) that the immunity of the object is lost if it is used for military purposes.

3. Not every place of worship can be considered to be part of the spiritual heritage of mankind.

4. This article is acceptable militarily to NATO, provided the Allied statements of understanding recorded at Geneva are taken into account, specifically that when the objects are used in support of the military effort they lose the special protection of this Article.

Finding

5. Article 53 is militarily acceptable subject to the following interpretation being established :-

These objects will no longer be protected under this article if they are used for military purposes.

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ARTICLE 54 - PROTECTION OF OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE CIVILIAN POPULATION

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party :-

a. as sustenance solely for the members of its armed forces; or

b. if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

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ARTICLE 54 - PROTECTION OF OBJECTS INDISPENSABLE TO THE SURVIVAL OF THE  
CIVILIAN POPULATION

Interpretation

1. The intention behind this article is clear - to prohibit any military action which would destroy or intercept foodstuffs, either in their natural or processed conditions, for the purpose of denying them to the civilian population for their sustenance value.

2. The wording of the article, however, is such that it erodes and substantially qualifies that intention, thus :

a. at paragraph 2 - the use of the phrase "for the specific purpose of denying them for their sustenance value to the civilian population", would not inhibit attacks which damaged or intercepted foodstuffs provided that the purpose of the attack was not to deny them to the enemy. Incidental damage to foodstuffs would therefore not be a violation of this rule. It would be possible to attack a wheatfield for the purpose of denying cover to enemy military forces.

b. exceptions to the prohibitions are inserted (at paragraph 3) to permit military action for the purpose of destroying, damaging or intercepting foodstuffs used as sustenance solely for the armed forces; or in direct support of military action, but such actions are forbidden when it may be expected to leave the civilian population with such inadequate food or water to cause its starvation or force its movement.

That rule, for its proper application, would entail consideration of a wide variety of factors (food and water stocks, alternative resources, means of transportation, etc.) on which a commander is likely to be inadequately informed. This could lead to the breakdown of the rule.

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3. Paragraph 5 recognises that there may be occasions when imperative military necessity will require that a nation defending its national territory breach this rule.

Military Observations

4. In land warfare, Article 54 is unlikely to be seriously inhibiting. It would not prevent military action against military objectives, even if incidentally "objects indispensable to the survival of the civilian population" were destroyed, removed or rendered useless. The restraint imposed by this article on land warfare would be little or no more stringent than the rules and constraints effective at present for Allied forces.

5. The existing laws of naval blockade are not affected by this article. However, the provisions of this article could invoke the need to permit transit of vessels carrying food for civilians to ensure their survival. It is envisaged that, in these circumstances :-

a. the rule, to be effective, would require supplementary measures to enable food carriers to travel freely under broadly the same conditions for identification and prevention of abuse as medical transport under Article 38, Second Geneva Convention, and under Articles 22 and 23 of Protocol I.

b. additionally, forces, as a condition, could require procedures on relief to be followed which call for assurances that supplies are not diverted for military purposes.

Failing such measures, identification of food carriers would prove impossible and the rule would break down in practice.

6. If suitable arrangements for identification of food carrying vessels could be made, and the freedom of transit of such vessels were honoured and conditions for distribution were accepted, the rule could work to Allied advantage since the European nations of the Alliance are reliant - to a large extent - on importation of foodstuffs.

Finding

7. Article 54 is militarily acceptable.



NATO CONFIDENTIAL

ARTICLE 55 - PROTECTION OF THE NATURAL ENVIRONMENT

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

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ARTICLE 55 - PROTECTION OF THE NATURAL ENVIRONMENT

Interpretation

1. Article 55 is essentially the same, in military terms, as paragraph 3 of Article 35 (Basic Rules) which contains the same basic prohibition. Indeed, Article 55 was drafted before Article 35(3) which is a condensed version of Article 55.

Article 55 contains three additional elements :-

a. care should be taken to protect the natural environment against widespread, long-term and severe damage.

b. it adds to the wording of Article 35, paragraph 3 the phrase:-  
"..... and thereby to prejudice the health or survival of the population".

c. It forbids attacks against the natural environment by way of reprisals.

2. The additional elements at 1a. and c. above, would not add to the restraints in military terms. As for 1b. above, it is clear from the negotiating record that the phrase was intended to qualify the obligation having the effect of permitting such attacks on the natural environment provided they do not prejudice the health or survival of the population.

3. Neither Article 55 nor Article 35 (paragraph 3) is intended to deal with weapons and techniques developed for the deliberate purpose of environmental modification. They are covered in the Environmental Modification Treaty signed earlier in 1977. The terminology used is similar but there are important differences.

Military Observations

4. The military comment on the core of this article are the same as those adduced for Article 35, paragraph 3.

Finding

5. Article 55 is militarily acceptable.

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ARTICLE 56 - PROTECTION OF WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease :-

a. for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

b. for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

c. for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

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5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligation under this article.

ARTICLE 56 - PROTECTION OF WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

Interpretation

1. The intent and wording of Article 56 are clear.

This is a new provision which protects dams, dykes and nuclear generating stations if attacks on them may cause the release of dangerous forces and consequent severe losses among the civilian population. Such installations, legitimate military targets under present law, would no longer be so in the conditions specified in the article.

Military Observations

2. The proscribed facilities (dams, dykes and nuclear electrical generating stations) are, in general, identifiable. Dams and dykes are difficult to breach with conventional weapons and would only be rare occasional targets.

Nuclear power stations are, still, relatively rare and more frequent in the West than in the Warsaw Pact countries.

3. It is considered that the prohibition in Article 56 would not be unduly inhibiting militarily.

Finding

4. Article 56 is militarily acceptable.

PART IV

PRECAUTIONARY MEASURES

ARTICLE 57 - PRECAUTIONS IN ATTACK

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken :

a. Those who plan or decide upon an attack shall :-

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

b. An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

c. Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.



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3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorising any attacks against the civilian population, civilians or civilian objects.

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ARTICLE 57 - PRECAUTIONS IN ATTACK

Interpretation

1. This article is designed to afford the maximum protection for civilians and civilian objects compatible with effective military action against military objectives in the planning and conduct of military operations.

Military Observations

2. Article 57, setting out precautions to be observed by military commanders in order to spare and minimise damage to the civilian population, civilians and civilian objects, at first sight seems to place a number of restrictions on commanders which could be gravely inhibiting.

3. However, each of the clauses which could be so inhibiting and/or militarily impracticable is qualified in such a way that the discretion of the commander is not eroded.

4. Paragraphs 2(a)(i)(ii) of the article require a commander to do everything feasible to ensure that targets are neither civilians or civilian objects and to choose means and methods of attack with a view to avoiding, or in any event, minimising loss or damage to civilians and civilian objects. In that context, Allies have placed on record an understanding that "feasible" refers to that which is practical or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations.

The use of the word "feasible" (and the understanding recorded) provide latitude for essential military judgement and action in combat.

5. Similarly, Clause 2(a)(iii) and 2(b) evoke the rule of proportionality - i.e. that damage to civilians should not be excessive in relation to the military advantage anticipated. This enables the judgement to be exercised and the necessary action to be taken by the commander concerned. This paragraph imposes no new obligations on commanders.

6. The military requirements are further protected by additional understandings placed on record by Allies at Geneva, viz. :-

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a. Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

b. The reference in Articles 51 and 57 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from an attack considered as a whole and not only from isolated or particular parts of that attack.

7. This article, bearing in mind the understandings cited above is not operationally inhibiting.

Finding

8. Article 57 is militarily acceptable, subject to the following interpretations being established :-

a. The word "feasible" in paragraph 2 of the Article (and throughout Part IV of this Protocol) means "that which is practicable or practically possible, taking into account all the circumstances ruling at the time, including those relevant to the success of military operations".

b. The rule of proportionality is defined as in Article 51 and Recommendation (1) to Article 51, namely the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack.

c. Decisions for attacks shall be based on information as defined in Article 51 and the understanding recorded at paragraph 14 in the Military Observations on Article 51, namely that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

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ARTICLE 58 - PRECAUTIONS AGAINST THE EFFECTS OF ATTACKS

The Parties to the conflict shall, to the maximum extent feasible :-

a. Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.

b. Avoid locating military objectives within or near densely populated areas.

c. Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

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ARTICLE 58 - PRECAUTIONS AGAINST THE EFFECTS OF ATTACKS

Interpretation

1. The intention behind this article is clear - to segregate civilians to the extent practicable from military objectives. Paragraph c. is a catch all, embracing and reinforcing the other articles in Chapter IV aimed at protection of civilians and civilian objects.

Military Observations

2. It is noted that, elsewhere, a military objective is defined(1), as so far as objects are concerned, as limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time, offers a definite military advantage. That definition is comprehensive, excluding no object which makes an effective contribution to enemy military action.

3. Wars are fought in territories as they exist, i.e. with no geographic distinction existing or, in peacetime conditions, possible between objects which "make an effective contribution to military actions" and those which do not. An armaments factory or fuel refinery, for example, unquestionably makes an effective contribution to military action, but will be located, because of the need for staff and logistic/infrastructure support, in an area populated by civilians. It is not practicable to avoid locating such military objectives within or near densely populated areas : if they were based in a wilderness, they would create their own densely populated areas. Similarly, it would be odd, at least, if Governments were to endeavour to remove the civilian population and individual civilians from the vicinity of the armaments factory or refinery (vital to the war effort) which is their livelihood and their reason for being in the area, which such removal would stop or slow down work making an effective, perhaps vital contribution to military action and thus to survival of the state concerned. Such a removal is not feasible.

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(1) See Article 52

4. Article 58 is apparently built on the assumption that it is possible to isolate or segregate some types of military objectives from centres of the civilian population and civilian objects - and that these two latter are, by definition, not military objectives. It may be feasible to accomplish some separation of military objective and concentration of civilians in such cases as prepositioned military stores or certain military installations, whereas in other situations it is not feasible because civilian/military facilities tend to be interwoven in any developed country. If a state fails to accomplish such feasible separations, however, the only practical consequence is higher civilian casualties in the event of armed conflict.

5. The NATO-agreed "stay-put-policy" and the pre-planned intentional deployment of military facilities and installations (positions, command posts, maintenance and supply depots) could be regarded as being inconsistent with the requirements of Article 58. But realities in developed countries have to be taken into account; this has been done by some Allied countries in the statement on "feasible". The requirement of Article 58, taking into account the afore-mentioned interpretation should not be read as an imperative, but rather as an exhortation. Article 58, thus interpreted, would not impose any specific burden on military commanders. The wording leaves sufficient flexibility for necessary military action.

Finding

6. Article 58 is militarily acceptable, subject to the interpretation of the word "feasible" being established as in the understanding (1) recorded at Art. 57, namely, that which is practicable or practically possible, taking into account all the circumstances ruling at the time, including those relevant to the success of military operations.

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(1) See Article 57 (Finding), Paragraph 8a. on page 62.



CHAPTER V

LOCALITIES AND ZONES UNDER SPECIAL PROTECTION

ARTICLE 59 - NON-DEFENDED LOCALITIES

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions :-
  - a. All combatants, as well as mobile weapons and mobile military equipment must have been evacuated.
  - b. No hostile use shall be made of fixed military installations or establishments.
  - c. No acts of hostility shall be committed by the authorities or by the population; and
  - d. No activities in support of military operations shall be undertaken.
3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol and of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions laid down in paragraph 2.
4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2

are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

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ARTICLE 59 - NON-DEFENDED LOCALITIES

Interpretation

1. This article clarifies and develops the existing law contained in Hague Regulations, Article 25.

2. If a "non-defended locality" were occupied by advancing forces, the locality would cease to be a "non-defended locality" and would therefore be open to attack.

Military Observations

3. This article, which clarifies the existing rules, meets Allied military requirements.

Finding

4. Article 59 is acceptable militarily.

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ARTICLE 60 - DEMILITARISED ZONES

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarised zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organisation, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarised zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions :-

a. All combatants, as well as mobile weapons and mobile military equipment, must have been evacuated.

b. No hostile use shall be made of fixed military installations or establishments.

c. No acts of hostility shall be committed by the authorities or by the population; and

d. Any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in sub-paragraph d. and upon persons to be admitted to the demilitarised zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party,

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which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarised zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarised zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

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ARTICLE 60 - DEMILITARISED ZONES

Interpretation

1. The purpose of this article, as that of previous Article 59 concerning "non-defended localities", is to provide immunity to the population living in those localities and to preserve the localities themselves because of their intrinsic value.

2. Legally, the main differences between "non-defended localities" and "demilitarised zones" lies in the manner in which their respective status has to be established. Namely :

a. Non-defended localities are protected once their specific de facto "non-defence" situation is established, the status of non-defended localities may be confirmed in an unopposed unilateral declaration.

b. Demilitarised localities acquire their status by virtue of express agreements.

3. The two categories of localities differ as regard site and purpose :-

a. In matter of site, a non-defended locality is "near or in a zone where armed forces are in contact", while demilitarised zone may be anywhere, since no specifications are contained in the article.

b. In matter of purpose, the institution of non-defended localities tends to protect them from tactical bombing or shelling, while that of demilitarised zones tend to protect them against strategic bombing or shelling.

4. The basic conditions to which the localities have to fulfil are common to the two categories, but in regard of the "activities" for the non-defended localities no activities in support of military operations must be undertaken, whereas for the demilitarised zones any activity linked to the military effort must have ceased.

Military Observations

5. No military disadvantages can be identified.

Finding

6. Article 60 is militarily acceptable.



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COMPENDIUM  
OF  
COMMENTS AND STATEMENTS OF UNDERSTANDING  
BY  
REPRESENTATIVES OF ALLIED NATIONS TO THE FOURTH SESSION OF THE  
DIPLOMATIC CONFERENCE ON THE REAFFIRMATION  
AND DEVELOPMENT OF INTERNATIONAL LAW  
APPLICABLE IN ARMED CONFLICTS  
RELEVANT TO  
MILITARY CONSIDERATION OF ARTICLES 35 - 60  
OF ADDITIONAL PROTOCOL 1 TO THE GENEVA CONVENTIONS

NOTE: These comments and statements of understanding are extracted from the provisional record of the final plenary meetings of the Conference. They do not, therefore, include statements of understanding made during the deliberations of Committee III which Committee developed the articles under review; this Compendium should therefore be read in conjunction with the report of Committee III, as necessary. Further, since the statements were extracted from the provisional record, they may not reflect the precise content or wording of the final record. Nevertheless, it is considered that the Compendium gives a summary, sufficiently comprehensive and accurate, of the interpretations given to articles currently under review by NATO Hq.

This Annex is to be downgraded to NATO UNCLASSIFIED when detached from its Enclosure.

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This Annex consists of 38 pages.

C O N T E N T S

<u>Article</u>	<u>Title</u>	<u>Statements by :-</u>
35	Basic Rules	GE, UK
36	New Weapons	FR, IT, UK
44	Combatants and Prisoners of War	CA, DA, FR, GE, IT, NL, NO, PO, TU, UK, US
45	Protection of Persons Who Have Taken Part in Hostilities	BE, IT
47	Mercenaries	CA, IT, NL, PO
48	Basic Rule	FR
50	Definition of Civilians and Civilian Population	CA (see also statements on Articles 51, 52 & 57 by FR, IT, NL, UK, US )
51	Protection of the Civilian Population	CA, FR, GE, IT, NL, TU, UK
52	General Protection of Civilian Objects	CA, FR, GE, IT, NL, UK, US
53	Protection of Cultural Objects and of Places of Worship	CA, GE, IT, NL, UK, US
55	Protection of Natural Environment	CA, FR, IT, NL
57	Precautions in Attack	FR, GE, IT, TU, US
58	Precautions Against the Effects of Attacks	CA, FR, GE, IT, UK
<u>General</u> :	Relating to the Protocol as a whole, and including understandings and/or comments on, inter alia, REPRISALS AND THE LIMITATION OF THE SCOPE OF PROTOCOL 1 TO CONVENTIONAL WARFARE.	FR, UK, US

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ARTICLE 35 - BASIC RULES

(OLD NUMBER 33)

WRITTEN EXPLANATIONS OF VOTE

FEDERAL REPUBLIC OF GERMANY

The delegation of the Federal Republic of Germany joined in the consensus on Article 33 (now 35) with the understanding that paragraphs 1 and 2 reaffirm customary international law, while paragraph 3 of this article is an important new contribution to the protection of the natural environment in times of international armed conflict.

Bearing in mind the special scope of application of Additional Protocol 1, it is the understanding of the Federal Republic of Germany that the interpretation of the terms "wide-spread", "long-term" and "severe" has to be consistent with the general line of thought as it emerged from the deliberations on this article in Committee III, as reflected in its report CDDH/215/Rev.1.

In no case should it be interpreted in the light of the respective terminology of other instruments of environmental protection that have a different scope of application altogether.

UNITED KINGDOM

The United Kingdom joined in the consensus on Article 33 (now 35). In relation to paragraph 3 of this article, however, I wish to state, as we stated on adoption of this article in Committee, that we regard this paragraph as otiose repetition of Article 48 bis (now 55) and would have preferred that paragraph 3 not be included in this article. We consider that it is basically in order to protect the civilians living in the environment that the environment itself is to be protected against attack. Hence the provision on protection of the environment is in our view rightly placed in the section on protection of civilians. Now that Article 33 has been adopted with paragraph 3, we shall interpret that paragraph in the same way as Article 48 bis, (now 55) which in our view is a fuller and more satisfactory formulation.

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ARTICLE 36 - NEW WEAPONS

(OLD NUMBER 34)

EXPLANATIONS OF VOTE

ORAL EXPLANATIONS OF VOTE

MR. FREELAND (UNITED KINGDOM) said that his delegation was pleased to be able to join in the consensus on Article 34 (now 36). He thought it appropriate to say on this occasion that in the past the provisions of international law had always been taken into account informally by his country during the process of weapons development; and, as a result, no weapons were in service with the British Armed Forces which would infringe international obligations on the design and use of weapons in armed conflict. The codification and further development of international law in this field, which would come out of the Additional Protocols, had provided an opportunity for the codification of existing practice and his country was therefore in the process of establishing a formal review procedure to ensure that future weapons would meet the requirements of international law.

MR. DI BERNARDO (ITALY) said that his delegation had joined in the consensus on Articles 33 (now 35) and 34 (now 36), bearing in mind above all the principles which inspired them. It could not, however, conceal its perplexity about the wording of those provisions, which could not be interpreted as introducing a specific prohibition operative in all circumstances attendant on the study, development, acquisition or adoption of particular weapons and methods of warfare.

MR. PAOLINI (FRANCE) said that although the provisions of Article 34 (now 36) had been drawn up for a humanitarian purpose, they were by their nature connected with the general problem of disarmament. His delegation had always maintained that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was not an appropriate forum for dealing with such problems. That was why the French delegation, although it had not opposed the consensus on the adoption of Article 34 (now 36) wanted to make it clear that it would have abstained if a vote had been taken.

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ARTICLE 44 - COMBATANTS AND PRISONERS OF WAR

(OLD NUMBER 42)

EXPLANATIONS OF VOTE

ORAL EXPLANATIONS OF VOTE

MR. VON MARSCHALL (FEDERAL REPUBLIC OF GERMANY) said that his delegation had voted for Article 42 (now 44) at the fifty-fifth meeting of Committee III because from the outset it had been convinced that guerrilla warfare should be firmly placed under the rules of international law; it had never concealed, however, that it had serious misgivings lest some of the terms of the article might prove harmful to the protection of the civilian population if guerrillas were not required to distinguish themselves sufficiently from the civilian population. At the fiftieth meeting of Committee III, on 8 June 1976, his delegation had made the following statement: "It (the Federal Republic of Germany) continued to be of the opinion that the basic aim of draft Protocol 1, namely, the greatest possible protection of the civilian population, could be endangered by paragraph 3 of the article". His delegation had accordingly reserved its right to review its position, even in plenary, if its doubts had not in the meantime been dispelled by an agreed understanding.

From Committee III's report, it appeared that the various delegations had largely succeeded in reaching agreement on the interpretation to be given to the provisions of Article 42 (now 44). Even so, some serious misgivings remained, and as a result a fair number of delegations had felt compelled to abstain in the final voting. His delegation had also abstained, and it wished that abstention to be understood as an appeal for further efforts to reach complete agreement on an interpretation of the article which would be fully in keeping with the basic aim of Protocol 1, namely the protection of the civilian population.

He would restrict himself to the foregoing remarks, at that point but would submit explanations of vote in a more detailed form to the Secretariat in writing.

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MR. DI BERNARDO (ITALY) said that his delegation had abstained essentially because of the ambiguity of paragraphs 3 and 4 of Article 42 (now 44), but considered that the article was not unacceptable in itself.

Paragraph 3 embodied and reaffirmed without amendment or derogation a basic rule of existing international law, the need for combatants to distinguish themselves from the civilian population.

By its very nature, the exception made to that rule in the same paragraph must be interpreted in a restrictive manner. It was aimed at protecting members of resistance movements in so far as they came within the context of an armed conflict between states.

With regard to the minimum conditions to be met, his delegation noted with satisfaction the fact that the combatants concerned must carry their arms openly during each military engagement and during the military deployment preceding the launching of an attack. That would of course include any movement of the military formation towards the place from which the attack was to be launched.

It was essential that the distinction principle should remain the basis of international humanitarian law, because on respect for that principle depended the protection of the civilian population.

However, his delegation would have preferred a more precise wording. The text left itself open to unacceptable interpretations.

Furthermore, paragraph 4, providing that combatants failing to meet the requirements set forth in paragraph 3 should nevertheless be given protections equivalent to those accorded to prisoners of war, obviously meant that such combatants lost their right to be regarded as prisoners of war and could consequently be prosecuted and punished as non-protected belligerents, while still benefiting from the other guarantees to which prisoners of war were entitled.

MR. FREELAND (UNITED KINGDOM) said that his country had abstained in the vote on this article. While the United Kingdom shared the desire to accord humanitarian protection as prisoners of war to a greater number of combatants, it had to balance this against the need to maintain the protection given to the civilian population. During the debate in Committee III, his delegation had pointed out that in the case of guerrillas these considerations must of necessity be opposed to each other and

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that any failure to distinguish between combatants and civilians could only put the latter at risk. His delegation had noted that this risk might well become unacceptable unless a satisfactory interpretation could be given to certain parts of the article. The doubts of his delegation on these matters had not been resolved to an extent which would permit them to support the article. In its explanation of vote at the Committee stage, his delegation had described these doubts and points of particular concern. He thought it necessary to restate now the main aspects of his delegation's interpretation of the article, particularly relation to its paragraph 3.

In the first place, it was his delegation's understanding that the basic rule contained in the first sentence of that paragraph meant that combatants had to distinguish themselves throughout military operations in a clearly recognizable manner. Secondly, it appreciated from the second sentence that there will be situations in which a guerrilla fighter cannot so distinguish himself from the civilian population, but it considered that these situations could exist only in occupied territory. Thirdly, it was concerned about the use, in sub-paragraph (b), of the word "deployment". It must interpret this expression as meaning any movement towards a place from which an attack was to be launched. Lastly, his delegation wished to make it clear that combatants who failed to meet the requirements set out in paragraph 3 must be regarded as having forfeited their combatant status, and may be tried and punished accordingly.

BELGIUM

The Belgian delegation refers to the explanation of vote which it gave when Article 42 (now 44) was adopted by Committee III.

FRANCE

The French delegation voted in favour of Article 42 (now 44) and refers to the explanation of vote which it gave in Committee III.

MR. BLOEMBERGEN (NETHERLANDS) said that his delegation had voted in favour of Article 42 (now 44) despite a certain lack of clarity in the text. It was glad to see the protection implied in combatant status extended to fighters who had hitherto been unprotected. That broadening of the scope of protection was especially beneficial in situations such as might arise in wars of national

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liberation. His delegation hoped that the new beneficiaries of combatant status would be prompted to comply with the requirements set forth in Article 42 (now 44), thereby enhancing the protection of the civilian population against the effects of hostilities. Article 42 (now 44), thus perceived, should improve the protection both of the legitimate combatant and of the civilian population. In all circumstances, of course, in which the distinction between combatants and the civilian population was weakened, implementation of the article would be jeopardized.

The Netherlands delegation was convinced that the fundamental rule distinction between combatants and the civilian population had not been weakened by Article 42 (now 44); it stressed, however, that the article should not be construed as entitling combatants to waive that distinction.

It understood the phrase "military deployment" in sub-paragraph (b) of paragraph 3 to mean "any tactical movement towards a place from which the attack is to be launched".

MR. SERUP (DENMARK) said that his delegation had abstained in the vote on Article 42 (now 44) in Committee III because it had appeared unduly to blur the distinction between civilians and combatants which was of fundamental importance in building the structure of the two Protocols. It had also felt that the text was far from clear and that its practical applicability was open to serious doubt.

The Danish delegation was still concerned about the practicability of Article 42 (now 44), as adopted, but, through intensive study and reflection, it had reached a better understanding of the correct meaning and interpretation of the article. Since Denmark had suffered the hardships of a military occupation, it was understandable that the Danish delegation should focus on that aspect of the article which related to the treatment and status of members of resistance movements who had not been able to fulfil the often difficult conditions of distinguishing themselves from civilians and were then captured by the Occupying Power. On that point, his delegation felt that, in comparison with the status resulting from an interpretation of Article 4 of the Third Geneva Convention, the provisions of paragraphs 4 and 5 of Article 42 (now 44) represented substantial progress. For that reason it had been able to cast a positive vote on Article 42 (now 44) in the plenary meeting.

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MR. MARRIOTT (CANADA) said that his delegation regretted that it had had to abstain in the vote on Article 42 (now 44), particularly in view of the importance of the problem. It was concerned about the perhaps necessary vagueness of the language adopted in some paragraphs, but hoped that time would make the meaning more precise.

Concerning the interpretation of the article, it wished to state :  
(1) that the situations described in the second sentence of paragraph 3 could exist only in occupied territory; or in armed conflicts as described in Article 1, paragraph 4 of Protocol 1; (2) that the phrase "military deployment preceding the launching of an attack" in paragraph 3 meant any movement towards a place from which an attack was to be launched; (3) that combatants who failed to meet the minimum requirements of the second sentence of paragraph 3 forfeited their combatants status and might be tried and punished accordingly; and (4), that armed forces personnel attached to resistance movements in occupied territory were entitled to operate under the same rules as the members of resistance movements.

MR. ALEIXO (PORTUGAL) said that, while welcoming the adoption of Article 42 (now 44), which reflected new realities by granting prisoner of war status in the event of capture to combatants not belonging to regular armed forces, his delegation had felt obliged to abstain in the vote because of its serious doubts with regard to the interpretation of the text. Furthermore, it questioned whether the protection of the civilian population was duly safeguarded.

Paragraph 3 appeared to embody a general rule and an exception; with regard to the general rule, the concept of "a military operation preparatory to an attack" was unclear and might cover a variety of situations; moreover, the description of the exceptional situations was ambiguous and his delegation doubted whether it was adequate to meet the innumerable practical problems which would arise.

There were two further imprecise concepts: "military deployment preceding the launching of an attack" and, in paragraph 5, "by virtue of his prior activities". Such lack of clarity might be harmful for combatants in view of the variety of possible interpretations.

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His delegation considered that, in order to ensure the protection of the civilian population, paragraph 3 should specify that combatants must clearly and unequivocally distinguish themselves from the civilian population by means of a distinctive sign. It also considered that the exceptional rule in the second sentence of the paragraph did not ensure reasonable protection for the civilian population.

MR. ALDRICH (UNITED STATES) said that he had not intended to make an oral explanation of his delegation's vote on Article 42 (now 44), but that the article had been the subject of so much inflated rhetoric and had been so distorted that he felt compelled to state clearly the understanding of the United States Government.

His delegation supported Article 42 (now 44), since it represented an important advance in the law and should improve the treatment of all members of the armed forces held prisoner by an adversary. It would be possible to comply with the article fully without significantly reducing the protection of civilians and the civilian population. The article conferred no protection on terrorists. It did not authorize soldiers to conduct military operations while disguised as civilians. However, it did give members of the armed forces who were operating in occupied territory an incentive to distinguish themselves from the civilian population when preparing for and carrying out an attack.

The basic rule contained in the first sentence of paragraph 3 meant that throughout their military operations combatants must distinguish themselves in a clearly recognised manner. Representatives who had stated or implied that the only rule on the subject was that set forth in the second sentence of paragraph 3 were wrong.

As regards the second sentence of paragraph 3, it was the understanding of his delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4 of draft Protocol 1. In those situations, a combatant who failed to distinguish himself from the civilian population, though violating the law, retained his combatant status if he lived up to the minimum requirements set forth in that sentence. On the other hand, the sentence was clearly designed to ensure that combatants, while engaged in a military operation preparatory to an attack, could not use their failure to distinguish themselves

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from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants. That meant that they might be tried and punished for acts which would otherwise be considered lawful acts of combat. That was justified because such combatants necessarily jeopardized the civilian population whom they were attempting to serve.

As regards the phrase "military deployment preceding the launching of an attack", in paragraph 3, his delegation understand it to mean any movement ~~wards~~ towards a place from which an attack was to be launched. In its view, combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack was to be launched.

MR. SOYSAL (TURKEY) observed that his delegation had explained its views on Articles 42 (now 44) when it had been adopted in Committee III. At that time his delegation had voted in favour of the article, although it did not fully meet its expectations. The problem was to find ways and means of providing maximum protection for those who took part in hostilities, including members of national liberation movements.

Turkey had always supported liberation movements that were duly recognized and was satisfied that such movements would benefit from the provisions of the article. A combatant was under the strict obligation to meet the minimum requirements laid down in the article when he claimed that he was entitled to prisoner of war status. Should he fail to do so, he would forfeit his combatant status and would therefore not benefit from the provisions of the article.

MR. LONGVA (NORWAY), stating that his delegation had voted for Article 42 (now 44) in Committee III, returned to the explanation of vote it had given at that time. In addition, his delegation considered that Article 42 (now 44) was among those articles of draft Protocol 1 (Articles 1, 41 (now 43), 42 bis (now 45) and 84 (now 96) to which, in accordance with the Vienna Convention on the Law of Treaties, no reservations could be made. As far as the title of the article was concerned, his delegation would have preferred it to emphasize the most important element, namely, improvement in the protection of the civilian population.

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WRITTEN EXPLANATION

FEDERAL REPUBLIC OF GERMANY

When Article 42 (now 44) was adopted in Committee III on 22 April 1977, the delegation of the Federal Republic of Germany voted in favour of this article because it was convinced from the outset that the practice of guerrilla warfare should be firmly placed under the rules of international law. My delegation never did conceal, however, that it had serious doubts whether some terms of this Article might not prove harmful to the protection of the civilian population, if guerrillas were not required to distinguish themselves sufficiently from the civilian population. Already at the 50th meeting of Committee III on 8 June 1976, the delegation of the Federal Republic of Germany made the following statement :- "The Federal Republic of Germany continued to be of the opinion that the basic aim of draft Protocol 1, namely the greatest possible protection of the civilian population, could be endangered by paragraph 3 of the article" (CDDH/III/SR.50, paragraph 22). The delegation of the Federal Republic of Germany therefore reserved the right to review its position, even in the plenary meeting if its doubts were not dispelled by an agreed understanding.

In our view, such an agreed understanding is to be based on the following pre-conditions :-

(1) If paragraph 3 of Article 42 (now 44), in the drafting of which this delegation took an active part, is to fulfil its important and necessary purpose, it has to be interpreted quite honestly and precisely in the light of the customary law rule of interpretation codified in Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties, which prescribed that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

(2) Keeping strictly to this rule of interpretation, the understanding of the Government of the Federal Republic of Germany concerning several provisions of Article 42 (now 44) is the following :-

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a. As to the introductory sentence of paragraph 3, the Report of Committee III on Article 42 (now 44) already states that this sentence restates the generally recognised rule of distinction. It is, therefore, the understanding of this delegation that the basic rule set forth in Article 42 (now 44), paragraph 3, first sentence, that combatants are obliged to distinguish themselves from the civilian population means that these combatants have to distinguish themselves in a clearly recognizable manner.

b. However, paragraph 3, second sentence, takes adequately into account the situations occurring in some modern types of international armed conflict. It is therefore the understanding of this delegation that paragraph 3, second sentence, applies only to exceptional situations such as those occurring in occupied territories.

c. The term "deployment" which was introduced by this delegation has caused the main difficulties of interpretation as being a specific military term. It is therefore the understanding of this delegation that the phrase in paragraph 3, sub-paragraph (b), "military deployment preceding the launching of an attack" means any movement toward a place from which an attack is to be launched.

d. As far as paragraph 4 of Article 42 (now 44) is concerned, this delegation is able to restate its position already declared at the Third Session of the Conference, namely that neither the internal law nor the basic views of the Federal Republic of Germany with regard to the subject of paragraph 4 create any obstacle to the implementation of this provision in full application of the Third Geneva Convention of 1949. In our view, the substance of paragraph 4 means that the Third Convention is and will remain the strict standard for the protection referred to in paragraph 4 of Article 42 (now 44). Nevertheless, combatants who fail to meet the minimum requirements of the second sentence of paragraph 3 forfeit their combatants status and may be tried and punished accordingly.

We have been glad to see that the Report of Committee III reflects a high degree of agreement on such a common understanding of the provisions of Article 42 (now 44). We also noted, however, that some serious doubts still exist and that a good number of delegations, therefore, felt compelled to abstain in the final voting on Article 42 (now 44). This delegation has also abstained and it wants this abstention to be understood as a signal for further and intensive common efforts to reach an agreement on an interpretation of this article that fully meets the requirements of the basic aim of Protocol 1, namely the protection of the civilian population.

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ARTICLE 45 - PROTECTION OF PERSONS WHO HAVE TAKEN PART IN HOSTILITIES

(OLD NUMBER 42 bis)

EXPLANATIONS OF VOTE

ORAL EXPLANATIONS OF VOTES

MR. DI BERNARDO (ITALY), observing that Article 42 bis (now 45) incorporated a text which his delegation had co-sponsored, expressed satisfaction at the adoption of the article by consensus since it was of great importance in the development of humanitarian law.

MR. DE BREUCKER (BELGIUM) welcomed the adoption of Article 42 bis (now 45) by consensus. It was at the time of a combatant's capture that the question of his status arose and it was the captor who would take the necessary decision. Paragraph 2 of the article would provide considerable protection for the captured person in those circumstances.

Paragraph 3 had the effect of making the provisions of Article 5 of the Fourth Geneva Convention of 1949 less severe.

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ARTICLE 47 - MERCENARIES

(OLD NUMBER 42 quater)

EXPLANATIONS OF VOTES

ÓRAL EXPLANATIONS OF VOTES

MR. MARRIOTT (CANADA), speaking in explanation of vote, welcomed the recognition by the Nigerian representative that mercenaries were entitled to the fundamental guarantees provided in Article 65. Although his delegation would have wished to see an explicit reference to Article 65 (now 75) in Article 42 quater, (now 47), it considered that the absence of such a reference did not prejudice the application of Article 65 to mercenaries.

MR. ALEIXO (PORTUGAL), speaking in explanation of vote, said that his delegation considered that mercenaries were adequately covered by Article 65 (now 75).

MR. DI BERNARDO (ITALY), speaking in explanation of vote, said that his delegation, while joining in the consensus, felt that paragraph 2 was not altogether satisfactory, since it left some margin of discretion as to whether a person was a mercenary or not. His delegation considered that mercenaries, though not entitled to prisoner of war status, were covered by Article 65 (now 75), which contained the fundamental safeguards to be given to all persons not enjoying more favourable treatment, regardless of the gravity of the crimes with which they might be charged.

WRITTEN EXPLANATIONS OF VOTES

NETHERLANDS

The Netherlands delegation has shared the consensus on Article 42 quater (now 47), notwithstanding certain misgivings about this article.

Our delegation is convinced of the necessity of action being taken against the persistent activity of mercenaries.

When considering this phenomenon it appears to us imperative to attack the problem at its roots, i.e. the practice of recruitment of mercenaries. Those morally most appalling practices should be impeded by effective legal measures, wherever they occur, and their authors prosecuted.

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The present article seeks to tackle the problem not at its roots but at the stage where the mercenary is already in his field of operation, where it will be found extremely difficult to take effective action against him.

My delegation supports these efforts. We are somewhat worried by the fact that in the list of criteria contained in this article, the motivation of a person has been brought into play. We should like to reiterate our position that the application of humanitarian law and the granting of humanitarian treatment should not be made dependent on some one's motivation for taking part in the armed conflict. Moreover, the element of motivation will be difficult to establish and could give rise to more than one interpretation.

Furthermore, the Netherlands delegation reiterates the applicability to a mercenary of the fundamental guarantees embodied in Article 42 bis (now 47) and 65 (now 75) of Protocol 1, which has been recognised by the Rapporteur of Committee III in his report of the same Committee that was adopted by consensus. At this moment, I would like to express my appreciation for the efforts of Ambassador Clark of Nigeria in finding a compromise solution. We have noted with satisfaction that Ambassador Clark in his declarations explicitly recognised the applicability of all fundamental rights to mercenaries, including those enshrined in Articles 42 bis (now 45) and 65 (now 75) of Protocol 1. We still regret, however, the absence of a specific reference to the fundamental guarantees mentioned among the provisions of the article itself.

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ARTICLE 48 - BASIC RULE

(OLD NUMBER 43)

EXPLANATION OF VOTE

ORAL EXPLANATION OF VOTES

FRANCE

Article 43 (now 48), which enunciates the basic rule of Section I of Part IV concerned with the general protection of the civilian population against the effects of hostilities, is the first of a series of articles which, after the manner of those in Part III relating to methods and means of combat, goes outside the specific context of humanitarian law for regulating the laws of war.

Although this article was drafted with a humanitarian purpose in view, it has direct implications as regards a State's organisation and conduct of defence against an invader. That is why the French delegation while not having opposed the consensus on the adoption of this article, wishes to make it clear that, if there had been a vote, it would have abstained therefrom.

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ARTICLE 50 - DEFINITIONS OF CIVILIANS AND CIVILIAN POPULATION

(OLD NUMBER 45)

EXPLANATIONS OF VOTES

WRITTEN EXPLANATION OF VOTES

CANADA

It is the view of the Canadian delegation that commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of whatever information from all sources may be available to them at the relevant time. This interpretation applies to the whole of this section of the Protocol, including Articles 45 and 47 (now 50 and 52).

The reference in Articles 46 and 50 (now 51 and 57, respectively) to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack.

UNITED STATES OF AMERICA

NOTE: The United States written explanation of vote on Article 57 (old number 50) also applies to new Articles 50, 51, 52 and 58.

GENERAL

NOTE: Statements made in the following articles, by the Nation listed, relate in part to Article 50 :

Article 51 - Netherlands.



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ARTICLE 51 - PROTECTION OF THE CIVILIAN POPULATION

(OLD NUMBER 46)

EXPLANATIONS OF VOTES

ORAL EXPLANATIONS OF VOTES

MR. PAOLINI (FRANCE) said that his delegation, while agreeing with the fundamental purpose behind Article 46 (now 51), felt that it went beyond the scope of humanitarian law and tended, in particular, to limit a nation's right of self-defence. His delegation especially objected to paragraphs 4, 5 and 6, which, in its opinion, were too complex and likely to hamper defensive operations in any country.

MR. SOYSAL (TURKEY) said that paragraphs 4 and 5 were open to different interpretations. He therefore proposed that the Conference should vote on Article 46 (now 51) paragraph by paragraph.

The Turkish proposal was rejected by 36 votes to 19, with 34 abstentions.

At the request of the representative of France, the vote on Article 46 (now 51) was taken by roll-call.

Tunisia, having been drawn by lot by the President, was called upon to vote first.

In favour :-

Tunisia, Union of Soviet Socialist Republics,  
Uruguay, Venezuela, Yemen, Democratic Yemen,  
Yugoslavia, Saudi-Arabia, Argentina, Australia,  
Austria, Bangladesh, Belgium, Brazil, Bulgaria,  
Canada, Chile, Cyprus, Ivory Coast, Cuba,  
Denmark, Egypt, United Arab Emirates, Ecuador,  
Spain, United States of America, Finland, Ghana,  
Greece, Guatemala, Honduras, Hungary, India,

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Indonesia, Iraq, Iran, Ireland, Israel, Libyan Arab Jamahiriya, Jamaica, Japan, Jordan, Kuwait, Lebanon, Luxembourg, Mexico, Mongolia, Mozambique, Nicaragua, Nigeria, Norway, New Zealand, Oman, Uganda, Pakistan, Panama, Netherlands, Peru, Philippines, Poland, Portugal, Qatar, Syrian Arab Republic, German Democratic Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, Romania, United Kingdom, Holy See, Sudan, Sri Lanka, Sweden, Switzerland, Czechoslovakia.

Against : France

Abstaining : Turkey, Zaire, Afghanistan, Algeria, Federal Republic of Germany, United Republic of Cameroon, Colombia, Italy, Kenya, Madagascar, Mali, Morocco, Monaco, Republic of Korea, Senegal, Thailand.

Article 46 (now 51) was adopted by 77 votes in favour, 1 against and 16 abstentions.

MR. FREELAND (UNITED KINGDOM) said that his delegation had voted in favour of Article 46 (now 51). It considered that the first three paragraphs contained a valuable reaffirmation of existing customary rules of international law designed to protect civilians. While it also welcomed the prohibition on indiscriminate attacks contained in paragraph 4, it thought that the language of that paragraph was not entirely clear. His delegation considered that the definition of indiscriminate attacks contained in that paragraph was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. In other words, the paragraph did not in itself prohibit the use of any specific weapon. Rather, the paragraph took account of the fact that the lawful use of means of combat depended upon the circumstances.



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His delegation considered that the reference in paragraph 5(b) to what had become known as the "rule of proportionality" was a useful codification of a concept which was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict. His delegation considered that the reference in that sub-paragraph (and in Article 50 (now 57)) to "military advantage anticipated" from an attack was intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

Finally, he referred to a point which he considered would apply in relation both to this Article and to all the other Articles in this section of the Protocol. His delegation welcomed all the provisions which were designed to protect civilians and civilian objects and which accordingly placed restraints on military action. However, it was clear to his delegation that military commanders and others responsible for planning, deciding upon or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which were available to them at the relevant time.

MR. DI BERNARDO (ITALY) said that his delegation had abstained in the vote on Article 46 (now 51) chiefly because of serious doubts about paragraphs 4 and 7. Its attitude to paragraph 4 related in particular to the vague language of sub-paragraphs (b) and (c), in which the definitions of indiscriminate attacks could give rise to misunderstanding. There was nothing in paragraph 4 to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods. It was not intended that the Protocol should infringe upon the competence of other bodies better equipped to deal with the subject, even from the technical view-point. That interpretation was explicitly confirmed by Article 50 (now 57), paragraph 2(a)(ii), which referred to the necessity of taking all feasible precautions (i.e. according to the circumstances) in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

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His delegation's attitude to Article 46 (now 51), paragraph 7 was based on the following considerations. The prohibition on the use of the presence or movements of the civilian population to shield or attempt to shield military objectives from attack pre-supposed that the State in question had large areas of uninhabited territory at its disposal. That, however, was frequently not the case. There were a large number of states whose territory was densely populated even near its frontiers. The provision could therefore in no case be interpreted as preventing or hindering a state that wished to do so from organising an effective system of defence. That was a fundamental right which no Government could renounce.

The validity of that interpretation was largely confirmed by Article 51 (now 58), sub-paragraph (b), which stated that the Parties to the conflict should to the maximum extent feasible, avoid locating military objectives within or near densely populated areas.

MR. MARRIOTT (CANADA) said that his delegation's interpretation of the term "indiscriminate attack" was the same as that of the United Kingdom. His delegation would submit a detailed statement in writing.

MR. SOYSAL (TURKEY) said that the wording of paragraphs 4 and 5 of Article 46 (now 51) were open to differing interpretations that could prejudice the application of the Protocol as a whole.

His delegation had therefore abstained in the vote on the article. It nevertheless had a positive attitude towards the spirit of the article as a whole and towards its aim of protecting the civilian population.

MR. SHELDON (BYELORUSSIAN SOVIET SOCIALIST REPUBLIC) said that his delegation had voted in favour of Article 46 (now 51), which was one of the most important articles of the Protocol. It would submit its further comments in writing.

MR. MARSCHALL (FEDERAL REPUBLIC OF GERMANY) said that his delegation would submit its explanation of vote in writing.

MR. BLOEMBERGEN (NETHERLANDS) said that it was his delegation's interpretation of Article 46 (now 51) that the reference to the military advantage anticipated from an attack (paragraph 5(b)) was intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack. The same remarks applied to the similar reference in Article 50 (now 57).

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WRITTEN EXPLANATIONS OF VOTES

CANADA

The Canadian delegation voted in favour of this article, since in its view, many of its provisions are codification of customary international law. However, the Canadian delegation also feels that some other provisions could give rise to interpretations, which in our view, would be contrary to the interest and purpose of this article. For that reason, our delegation deems it appropriate to explain its interpretation.

The definition of indiscriminate attack contained in paragraph 4 of Article 46 (now 51) is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view, that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.

FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany could not cast a positive vote on Article 46 (now 51) of Protocol 1 because the wording of this article lends itself to possible misinterpretations. We have not voted against the article, however, but were able to abstain, for it is our understanding that the definition of indiscriminate attacks contained in paragraph 4 of Article 46 (now 51) is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently, the definition does not prohibit as indiscriminate any specific weapon. Moreover, the reference in paragraph 5(b) to military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack.

It is also the understanding of the Federal Republic of Germany that Article 46 (now 51), paragraph 6 applies insofar as - according to the preceding paragraphs - the civilian population as well as individual civilians enjoy protection against military operations.

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NETHERLANDS

It is the interpretation of the Netherlands delegation that the references in Articles 46 (now 51) and 50 (now 57) to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack.

UNITED STATES OF AMERICA

NOTE: The United States written explanation of vote on Article 57 (old number 50) also applies to new Articles 50, 51, 52 and 58.

(RELEVANT TO ARTICLE 46) (Now 51)

FRANCE - ARTICLE 74 (now 85) of Protocol 1.

Although not opposed to the consensus, the French delegation wishes to state that had there been a vote on Article 74 (now 85), it would have abstained.

It cannot support sub-paragraph (b) of paragraph 3 of Article 74 (now 85). When the Conference was considering Article 46, which we were against we stressed the ambiguity of the definition of indiscriminate attacks.

The French delegation cannot agree to having military actions that are so ill defined regarded as grave breaches and, according to paragraph 5, as war crimes. In the circumstances, it could not but oppose paragraph 3(b).

With regard to the provisions of paragraph 4, we think that the grave breaches covered by points (a), (b) and (c) should normally be subject to the same legal conditions as those stated in paragraph 3, that is to say that to be regarded as grave breaches, they should cause death or serious injury to body or health. This interpretation alone makes it possible to preserve the necessary uniformity of the law on the grave breaches covered by Article 74 (now 85), which are similar in kind.

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ARTICLE 52 - GENERAL PROTECTION OF CIVILIAN OBJECTS

(OLD NUMBER 47)

EXPLANATION OF VOTES

ORAL EXPLANATIONS OF VOTES

At the request of MR. PAOLINI (FRANCE), the PRESIDENT put Article 47 (now 52) to the vote.

Article 47 (now 52) was adopted by 79 votes to none, with 7 abstentions.

MR. PAOLINI (FRANCE), referring to the stipulation in the first sentence of paragraph 2 of Article 47 (now 52) that "attacks shall be strictly limited to military objectives", said that, as his delegation had already indicated in connection with Article 46, there were many situations in armed conflicts in which it was difficult or even impossible to determine precisely the limits of a military objective, particularly in large towns and in forest areas, in either of which enemy armed forces and groups of civilians might be intermingled. His delegation was therefore unable to accept such a restriction, which, by the strictness of its terms, could seriously prejudice the exercise of the legitimate right of self-defence, and it had therefore been obliged to abstain in the vote.

MR. DI BERNARDO (ITALY) said that his delegation had voted in favour of Article 47 (now 52) but wished to emphasise that its interpretation of the first sentence of paragraph 2 was the same as the interpretation it had adopted for the similar provision in Article 46 (now 51).

MR. AKKERMAN (NETHERLANDS) said his delegation would submit a written statement on Article 47 (now 52).

MR. FREELAND (UNITED KINGDOM) said that his delegation had voted in favour of Article 47 (now 52). It was glad to see the partial definition of "military objective" which is contained in it. It appeared to his delegation to provide

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a needed clarification of the law. It noted in particular that a specific area of land may be a military objective if, because of its location or other reasons specified in the article, its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offered a definite military advantage. His delegation also welcomed the reaffirmation in paragraph two of the customary law rule that civilian objects must not be the direct object of attack. It did not, however, interpret this paragraph as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the object of the first sentence of paragraph two was to prohibit only such attacks as may be directed against non-military objectives.

MR. MARRIOTT (CANADA), MR. ALDRICH (UNITED STATES OF AMERICA) and MR. MAHONY (AUSTRALIA) said that their delegations would submit written statements on the article.

WRITTEN EXPLANATIONS OF VOTESCANADA

In the view of the Canadian delegation, a specific area of land may also be a military objective if, because of its location or other reasons specified in Article 47 (now 52), its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

It is also our understanding that the first sentence of paragraph 2 prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attacks may cause.

FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany has been able to vote in favour of Article 47 (now 52) of Protocol 1 because it is our understanding that a specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 (now 52), its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

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The first sentence of Article 47 (now 52), paragraph 2 is a re-statement of the basic rule contained in Article 43 (now 48), namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.

FRANCE

The first sentence of paragraph 2 of Article 47 (now 52) lays down that "attacks shall be strictly limited to military objectives".

The French delegation, as it has already pointed out in the case of Article 46 (now 51), draws attention to the fact that in a good many situations of armed conflict it would be very difficult, if not impossible, especially in large towns or wooded areas, either of which might harbour indiscriminately enemy military forces and groups of civilians more or less closely mixed together. It is therefore unable to accept such a prohibition which, owing to its categorical terms, is likely to be seriously prejudicial to the exercise of the natural right of legitimate defence, and has consequently been obliged to abstain from voting.

NETHERLANDS

With regard to Article 47 (now 52), the Netherlands delegation interprets this article to mean that a specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 (now 52), its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Furthermore, it is the view of the Netherlands delegation that the first sentence of Article 47 (now 52), paragraph 2 prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives.

UNITED STATES OF AMERICA

Article 47 (now 52) is a significant and important development in the humanitarian law applicable in armed conflict. The distinction between civilian objects and military objectives will be made easier to identify and

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recognise. In that regard, it is the understanding of the United States that a specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 (now 52), its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time offers a definite military advantage.

The first sentence of Article 47 (now 52), paragraph 2 prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.

NOTE : The US written explanation of vote on Article 57 (old number 50) also applies to new Articles 50, 51, 52 and 58.

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ARTICLE 53 - PROTECTION OF CULTURAL OBJECTS AND OF PLACES OF WORSHIP

(OLD NUMBER 47 bis)

EXPLANATION OF VOTES

WRITTEN EXPLANATIONS OF VOTES

CANADA

In the view of the Canadian delegation, this article was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects. Rather, the article establishes a special protection for a limited class of objects which because of their recognised importance constitute a part of the cultural heritage of mankind. We were happy to note that the article was made "without prejudice" to the provisions of the Hague Conventions for the Protection of Cultural Property, thereby implicitly recognising the exceptions provided for in that convention.

FEDERAL REPUBLIC OF GERMANY

It is the understanding of the Federal Republic of Germany that Article 47 bis (now 53), establishes a special protection for a limited class of objects which, in the particular circumstances, constitute a part of the cultural or spiritual heritage of mankind. Such objects remain protected whether or not they have been restored. The illegal use of these objects for military purposes, however, will cause them to lose the protection provided for in Article 47 bis, (now 53) as a result of attacks which are to be directed against such military uses. In such a case the protected object becomes a military objective.

It is further the understanding of the Federal Republic of Germany that Article 47 bis (now 53) was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects.

The understanding of the Federal Republic of Germany concerning Article 47 bis (now 53) is limited to this Protocol and does not affect any obligations under the Hague Convention for the Protection of Cultural Property of 14 May 1954.

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ITALY

The Italian delegation has the honour of being one of the sponsors of the amendment proposed by a number of countries to Article 47 bis (now 53), and it therefore welcomes the adoption of that amendment and of the article, as thus amended, as a whole.

My delegation wished to emphasise, throughout the various sessions of the Conference, the very keen interest it takes in the problem of the protection of cultural objects and of places of worship.

The article we have adopted is a most useful addition to the system of guarantees introduced by the Hague Convention of 14 May 1954, and it embodies principles that are of fundamental importance to my country.

The desire to ensure for nations the preservation and enjoyment of the historic monuments, works of art and places of worship which constitute their common cultural or spiritual heritage is in line with the universally shared aim of safeguarding for human beings, in situations of armed conflict, not only their own physical safety, but also respect for and preservation of those expressions and evidences of civilisation which are the foundation of all intellectual and moral progress.

NETHERLANDS

Article 47 bis (now 53) established a special protection for a limited class of objects which, because of their recognised importance, constitute a part of the cultural heritage of mankind. It is our understanding that the illegal use of these historical objects for military purposes will cause them to lose effective protection as a result of attacks directed against such military uses.

UNITED KINGDOM

My delegation has joined in the consensus on this article as amended by document CDDH/412/Rev.1. We note particularly the use of the expression "spiritual heritage", which qualifies the reference to places of worship and makes it obvious that the protection given by this article extends only to those places of worship which do constitute such spiritual heritage. Many holy places are thus covered, but it is clear to my delegation that the article is not intended to apply to all places of worship without exception.

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Secondly, my delegation does not understand this article as being intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations, which protect a variety of cultural and religious objects. Rather, this article establishes a special protection for a limited class of objects which, because of their recognised importance, constitute a part of the heritage of mankind. It is the understanding of my delegation that if these objects are unlawfully used for military purposes, they will thereby lose effective protection as a result of attacks directed against such unlawful military uses.

UNITED STATES OF AMERICA

We are pleased to see that the nations represented at this Conference so overwhelmingly endorse and support a special recognition for objects of cultural or spiritual heritage of mankind. It is the understanding of the United States that this article was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects. Rather, the article establishes a special protection for a limited class of objects which because of their recognised importance constitute a part of the special heritage of mankind. Other monuments, works of art or places of worship which are not so recognised, nonetheless represent objects normally dedicated for civilian purposes and are therefore presumptively protected as civilian objects in accordance with the provisions of Article 47 (now 52).

We note that the use of these objects in support of the military effort is a violation of this article. Should they be used in support of the military effort it is our clear understanding that these objects will lose the special protection of this article.

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ARTICLE 55 - PROTECTION OF NATURAL ENVIRONMENT

(OLD NUMBER 48 bis)

EXPLANATION OF VOTES

ORAL EXPLANATIONS OF VOTES

MR. DI BERNARDO (ITALY) said that his delegation would be glad to join in a consensus on the adoption of Article 48 bis (now 55). The article marked a big step forward in the protection of the natural environment in the event of international armed conflict.

In view of the specific aims and the scope of application of Additional Protocol 1, he thought that the adjectives "widespread", "long-term" and "severe" qualifying "damage" should be interpreted.

MR. MARRIOTT (CANADA) and MR. ALDRICH (UNITED STATES OF AMERICA) said that their delegations would submit their comments in writing.

MR. BLOEMBERGEN (NETHERLANDS) stressed that Article 47 bis (now 53) provided special protection for a limited category of objects which by virtue of their generally recognised importance constituted part of the cultural or spiritual heritage of mankind.

WRITTEN EXPLANATIONS OF VOTES

FRANCE

Article 48 bis (now 55) concerning the protection of the natural environment lays down rules for the conduct of war. As such, it has direct implications for the organisation and management of a country's military defence against invasion.

The French delegation, aware that the article was drafted with a humanitarian aim which it shares, did not oppose the consensus on the adoption of the article, but wishes it to be known that had there been a vote, it would have abstained.

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ARTICLE 57 - PRECAUTIONS IN ATTACK

(OLD NUMBER 50)

EXPLANATIONS OF VOTES

ORAL EXPLANATIONS OF VOTES

MR. PAOLINI (FRANCE) said that his delegation fully endorsed the overall humanitarian aim of Article 50 (now 57), which sought to reduce the effects of military operations on the civilian population as far as practicable. However, paragraph 2 of Article 50 (now 57) like the provisions of Article 46 (now 51) on indiscriminate attacks, was open to restrictive interpretations likely to hinder the exercise of the natural right of self-defence. His delegation was therefore unable to join a consensus on the article.

Replying to the President, he asked that Article 50 (now 57) should be put to a vote.

Article 50 (now 57) was adopted by 90 votes to none, with 4 abstentions.

MR. SOYSAL (TURKEY) said that as far as his delegation was concerned, the word "feasible" in Article 50 (now 57) and other articles should be interpreted in the light of all the factors present at a particular time, and specifically those relating to the success of military operations.

WRITTEN EXPLANATIONS OF VOTES

FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany has voted in favour of Article 50 (now 57) of Protocol 1 on the understanding that commanders and others responsible for planning, deciding upon or executing an attack necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

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Furthermore, it is our understanding that the reference to military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack.

Finally, we interpret the word "feasible" as meaning what is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.

As to the legal quality of Article 50 (now 57), on which one delegation has commented, the Federal Republic of Germany holds the view that this article is a rule applicable in international armed conflicts and, therefore, is in no way connected with the question of aggression, the prohibition of which is a problem of the law of prevention of war.

ITALY

The Italian delegation voted for Article 50 (now 57) because it appreciated the importance, from the standpoint of humanitarian law, of a provision that imposes the obligation of taking serious precautions in attack in order to spare civilians and civilian objects to the greatest possible extent.

Despite praiseworthy intentions, Article 50 (now 57), being a compromise text, is deficient in clarity because of its generally vague wording.

As to the evaluation of the military advantage expected from an attack, referred to in sub-paragraph 2 (a)(iii), the Italian delegation wishes to point out that that expected advantage should be seen in relation to the attack as a whole, and not in relation to each action regarded separately.

In several places, Article 50 (now 57) speaks of taking all "feasible" precautions. This term is basic to the whole structure of Article 50 (now 57). It indicates that the obligations it imposes are conditional on the actual circumstances really allowing the proposed precautions to be taken, on the basis of the available information and the imperative needs of national defence.

I would like to emphasize that all the foregoing comments relate to all the articles in the section of the Protocol concerned, in particular Article 46 (now 51) as regards the military advantage expected, and Articles 46 (now 51) and 51 (now 58) as regards the meaning of the word "feasible".

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WRITTEN EXPLANATIONS OF VOTES

UNITED STATES OF AMERICA

It is the view of the United States that Article 50 (now 57) represents a major step in the reaffirmation and development of humanitarian law applicable in armed conflict. Not only does it codify for the first time the rule of proportionality but it also gives to military commanders uniformly recognised guidance on this responsibility to civilians and the civilian population in carrying out attacks against military objectives.

Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. This, of course, is appropriate for the entire section including Articles 45 (now 50) and 47 (now 52).

The reference in Articles 46 (now 51) and 50 (now 57) to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack.

It is the understanding of the United States that the word "feasible" when used in this Protocol, for example in Articles 50 (now 57) and 51 (now 58), refers to that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations.



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ARTICLE 58 - PRECAUTIONS AGAINST THE EFFECTS OF ATTACKS

(OLD NUMBER 51)

EXPLANATIONS OF VOTES

ORAL EXPLANATIONS OF VOTES

MR. PAOLINI (FRANCE) said that Article 51 (now 58), relating to precautions against the effects of attacks, had a humanitarian purpose - namely, protection of the civilian population - to which the French delegation subscribed, particularly so far as sub-paragraphs (a) and (c) were concerned. On the other hand, he wished to express his keen sense of anxiety about the provisions contained in sub-paragraph (b), since provisions of that kind could not, in practice, be applied in all regions of the world having a high population density. He wished to point out that the expression "to the maximum extent feasible" used in such provisions, if they were to be applied in the concrete case of France, could not really become operative, given the distribution and density of the population, unless it were accepted that French territory would not be defended.

That amounted to saying either that it was impossible to apply the provisions of sub-paragraph (b) or that such provisions, if they were actually applied, would prevent France from exercising its right of self-defence, which was unacceptable.

In the circumstances, his delegation would be unable to vote in favour of those provisions. It could not, therefore, participate in the consensus, and called for a vote to be taken.

At the request of the French delegation, a vote was taken by show of hands on the adoption of Article 51 (now 58).

Article 51 (now 58) was adopted by 80 votes to none, with 8 abstentions.

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MR. FREELAND (UNITED KINGDOM) unhesitatingly welcomed this article, which was designed to reinforce the protection already given by earlier articles to civilians and civilian property. In armed conflict however, this protection could never be absolute and this fact was reflected in the article by the use of the expression "to the maximum extent feasible".

His delegation interpreted the word "feasible", whenever it was used in the Protocol, as referring to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.

WRITTEN EXPLANATIONS OF VOTES

CANADA

It is the understanding of the Canadian delegation that the word "feasible" when used in this Protocol, for example in Articles 50 (now 57) and 51 (now 58), refers to that which is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant to the success of military operations.

UNITED STATES OF AMERICA

NOTE: The United States written explanation of vote on Article 57 (old number 50) also applies to new Articles 50, 51, 52 and 58.

GERMANY

FEDERAL REPUBLIC OF GERMANY

The Federal Republic of Germany has voted in favour of Article 51 (now 58) of Protocol 1 because it is our understanding that the word "feasible" refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.

ITALY

The Italian delegation voted for Article 51 (now 58) because it has the merit of indicating the precautions that each Party to the conflict should take against the effects of attacks in order to reduce the dangers for the civilian population and civilian objects.

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The words "to the maximum extent feasible" at the beginning of the article in question, however, clearly show the real aim of this rule; this is not a question of absolute obligations, but on the contrary, of precepts that should be followed if, and to the extent that, the particular circumstances permit. This is particularly true of sub-paragraph (b) "Avoid locating military objectives within or near densely populated areas". Thus it is clear that a State with a densely populated territory could not allow that provision to hamper the organisation of its defence. The right of self-defence against, and of resistance to, any aggression has overriding force. It is thus unthinkable that the intention of Article 51 (now 58) should be to place that right in jeopardy.

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AND CONTAINING UNDERSTANDINGS AND/OR COMMENTS  
ON, INTER ALIA, REPRISALS AND THE LIMITATION  
OF THE SCOPE OF PROTOCOL 1 TO CONVENTIONAL WARFAREFRANCE

En conséquence, la délégation française tient à préciser très nettement que son gouvernement ne saurait admettre en aucun cas, que les dispositions du protocole 1 puissent porter atteinte au "droit naturel de légitime défense" que la France entend exercer dans sa plénitude, conformément à l'article 51 de la charte des Nations Unies, ni que les dispositions de ce protocole puissent lui interdire l'emploi d'aucune arme spécifique qu'elle juge nécessaire à sa défense. Le gouvernement français a pris acte dès 1973 de ce que le CICR n'avait pas inclus dans ses projets une réglementation des armes atomiques.

En participant à l'élaboration des dispositions des protocôles additionnels, le gouvernement français n'a donc pris en considération que les conflits, mêmes avec des armements conventionnels. Il tient par suite à marquer qu'il considère pour sa part que les règles des dits protocôles ne s'appliquent pas à l'emploi des armes nucléaires. Le gouvernement français rappelle à cette occasion qu'il a indiqué à maintes reprises qu'il était disposé à étudier avec les puissances directement concernées, et en vue de parvenir à un désarmement général contrôlé, les problèmes posés par l'existence des armements nucléaires.

UNITED KINGDOM

The Ad Hoc committee's work on weapons has of course been entirely concerned with conventional weapons. It is clear to my delegation that this is also true of the work of the rest of the conference. In plenary at the first session, we expressed our concurrence in the view that the draft protocols were

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not intended to broach problems concerned with atomic, bacteriological and chemical warfare. Nothing in the 4 years work since then, or in the texts themselves, has caused us to depart from that view. It therefore continues to be my government's understanding that the new rules introduced by the protocols are not intended to have any effect on and do not regulate or prohibit the use of nuclear or other non-conventional weapons. Such questions are, rightly, the subject of agreement and of negotiations elsewhere.

UNITED STATES

The United States welcomes the adoption of Protocol 1. We are satisfied that this Protocol represents a major advance in international humanitarian law, an advance of which this Conference can be proud. We hope that it will be signed and ratified by all the States represented in this Conference.

The Delegation of the United States is particularly happy to welcome the inclusion in the Protocol of the provisions on the protection of medical aircraft, which will for the first time give such aircraft significant immunity from attack. We also welcome the articles designed to ensure accounting for those who are missing in action and the protection of the remains of the dead.

We believe the provisions on protecting powers, although they fall short of our desires, represent an improvement over the Geneva Conventions and will, at least, make it more difficult and embarrassing in the future for a State to refuse to permit external observation of how it treats its prisoners. In this connection, we welcome the clear statement in the preamble that no person protected by the Conventions or the Protocol can be denied these protections through charges of aggression and the statement in Article 44 that a soldier cannot be deprived of his status as a prisoner of war by allegations of war crimes. History has shown, unfortunately, that protections such as these are needed.

The Delegation of the United States looks with satisfaction on a number of other important advances in the law made by this Protocol. In particular, we note the prohibition of indiscriminate attacks, including target area bombardment in cities, the clear and helpful definition of military objectives, the prohibition of starvation of civilians as a method of warfare

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and of destruction of crops and food supplies, and the special protection, with reasonable exceptions, accorded dams, dikes and nuclear power stations. My delegation believes the Conference can take satisfaction in having achieved the first codification of the customary law rule of proportionality, in having worked out a good definition of mercenaries that should not be open to abuse, and in setting minimum, humanitarian standards that must be accorded to anyone who is not entitled to better treatment.

During these plenary sessions we have already commented on a number of articles which, because of compromise or vague language required clarification. I shall not repeat those previous statements, but there are a few remaining questions on which I wish to comment.

The problem of assuring compliance with the Conventions and the Protocol, not only by individuals, but also by governments is extraordinarily difficult. In addition to the provision on protecting powers, we welcome the emphasis placed on dissemination, on the provision for legal advisors to the military forces, and on the responsibility of commanders and others in authority to take steps to prevent violations. These provisions will promote increased training for both civilians and the armed forces, and such training is necessary to improve compliance with the law. The structure of "grave breaches" established in the Conventions was taken over by the Protocol and enlarged upon. We welcome the provision on grave breaches, but in order to avoid possible misunderstanding, we would emphasize that to constitute a "grave breach" an act must violate one or more substantive rules of the Protocol or the Conventions.

The provisions on responsibility and cooperation of governments are important for the reaffirmation of existing law. However, as between adversaries reciprocity and mutuality of interest remain perhaps the most powerful pressures for compliance. The Protocol has gone far to remove the deterrent of reprisals. This has been done for understandable and commendable reasons in view of past abuses.

However, in the event of massive and continuing violations of the Conventions and the Protocol, this series of prohibitions on reprisals may prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying

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the possibility of such a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflicts.

As I mentioned earlier, the Government of the United States considers that the Protocol is designed to afford the greatest possible protection to civilians and other victims of war during international armed conflict. To that end it imposes a number of significant restraints on the use of means and methods of warfare. From the outset of the Conference, it has been our understanding that the rules to be developed have been designed with a view to conventional weapons. During the course of the Conference we did not discuss the use of nuclear weapons in warfare. We recognise that nuclear weapons are the subject of separate negotiations and agreements, and further that their use in warfare is governed by the present principles of international law. It is the understanding of the United States that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. We further believe that the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.

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ANNEX 2 to  
ENCLOSURE to  
MCM- 76-77





NORTH ATLANTIC MILITARY COMMITTEE  
~~COMITE MILITAIRE DE L'ATLANTIQUE~~ NORD

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CORRIGENDUM to  
MCM-76-77

7 November 1977

CORRIGENDUM

TO

MCM-76-77, 31 OCTOBER 1977

SUBJECT: Humanitarian Law - Review of Articles 35 - 60  
of Protocol 1.

Holders of the above document are requested to make the following editorial amendments :-

Page 3 - Para. 4.e. Line 1 - Delete "implication"  
Substitute "application"

Enclosure, Page 3, Line 4 - Delete "difference"  
Substitute "differences"

Page 11, Para 1, Line 3 - Delete "as"  
Substitute "an"

Page 27, Para 1, Line 5 - Delete "billigerent"  
Substitute "belligerent"

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CORRIGENDUM to  
MCM-76-77

-1-

This document consists of  
2 pages

*Posted  
P 25 Oct 2011*

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Page 27, Para 5, Line 4 - Delete "permissible"  
Substitute "punishable"

Page 41, Para 7, Line 18 - Delete "crutial"  
Substitute "crucial"

*P.B. Cavendish*

*for* G. SCHMÜCKLE *Brig*  
Lieutenant General, GEAR  
Director,  
International Military Staff

DISTRIBUTION: As for basic document.