*REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS*

# CONFERENCE OF GOVERNMENT EXPERTS

*It is a well known fact that the ICRC has embarked upon a new stage in the development of international humanitarian law, in accordance with the formal instructions received from the XXIst International Conference of the Red Cross, and for which purpose it convened preparatory meetings of experts. Following the Conference of Red Cross Experts at The Hague, a Conference of Government Experts was held in Geneva in 1971. The* International Review *gave a detailed account of the main subjects dealt with by the conference; at the time the ICRC published the report summing up the Conference proceedings.*[1]

*This meeting of government experts, however, was unable to cope with all the subjects it had before it, some of which were not even broached, and the ICRC therefore decided to organize a second session, again preceded by a Conference of Red Cross Experts, which was held in Vienna in March 1972.*

*The second session opened in Geneva on 3 May 1972 and closed early in June. More than four hundred experts were delegated by seventy-seven governments, and four commissions studied the texts of the two Draft Additional Protocols to the 1949 Geneva Conventions. The subjects considered were the following:*

— Protection of the Wounded, the Sick and the Shipwrecked in International Armed Conflicts (Commission I).

— Non-international Armed Conflicts (Commission II).

[1] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. *Report on the Work of the Conference.* ICRC, Geneva, 1971, 121 pages. Sw.Fr. 15.—

— Protection of the Civilian Population against Dangers Resulting from Hostilities; Combatants; Protection of Journalists Engaged in Dangerous Missions (Commission III).
— Measures Intended to Reinforce the Implementation of the Geneva Conventions (Commission IV).

*The International Committee recently published two volumes on the second session of the Conference.*[1] *A few excerpts from the reports on the work of Commissions II and III are given below. Besides the report on the plenary sittings, Volume II contains all the written proposals submitted by experts, the Draft Additional Protocols submitted by the ICRC, and various legal instruments.*

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**Commission II**

*Commission II was responsible for studying problems relating to non-international armed conflicts. When the International Committee of the Red Cross submitted for its consideration a Draft Additional Protocol to Article 3 common to the four Geneva Conventions of August 12, 1949, some of the experts wondered whether it might not be advisable to draw up an Additional Protocol which would be applicable to all armed conflicts, whether international or non-international, since the victims' sufferings were the same in either type of conflict. Most of the experts nevertheless pronounced in favour of the two distinct Protocols, so as to take into account the fundamentally differing material and political requirements of the two types of armed conflict.*

2.19 One expert, who considered that it would be wise to draw up two distinct Protocols, gave his opinion as to the purpose and content of Protocol II, as drafted by the ICRC on the basis of his 1971 proposal (CE/Plen/2bis). The purpose of this instrument was to ensure the application of humanitarian law to non-international

[1] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. *Report on the Work of the Conference*, ICRC, Geneva, 1972. Two volumes (209 pages and 116 pages), Sw.Fr. 25 for the two volumes.

armed conflicts in order to reduce suffering. In theory, it was possible to draw a distinction between: (1) the type of conflict which was considered to be of an international character because several States were involved; (2) the conflicts covered by common Article 3, and (3) internal disturbances in which only the authorities in power had a regular army. The difficulty of such distinctions was that, in practice, States refused to recognize that conflicts taking place in their territories fell within categories 1 or 2, considering them rather as belonging to the third category and, therefore, refusing to apply humanitarian law. This attitude was closely related to the question of the treatment to be given to rebel combatants. In the opinion of the expert, the only way of approaching this question would be to consider that humanitarian law should be applied whenever the State resorted to the use of its armed forces against any persons, regardless of the way in which those persons behaved, whether or not they wore uniform, and whether or not they were members of an organization. This last question, concerning the treatment to be given to combatants captured by the adverse party, should be dealt with separately, assuming the unlikely hypothesis that the State would grant prisoner-of-war status, and therefore immunity, to rebel combatants. The question should not be seen as a prior condition to the application of the Protocol, which provided for the protection of the population as a whole. In the opinion of the expert, the only indispensable condition was that laid down in Article 1, namely the active use of the armed forces against persons. But, this condition having been stated, the provisions should not permit any interference in the internal affairs of a State; if they did, States would find it impossible in future to apply the provisions of humanitarian law in all types of non-international armed conflict.

2.20 Several experts considered that the draft Protocol involved establishing a very delicate balance between the requirements of humanitarian law and the imperatives of State security.

2.21 Certain experts were of the opinion that the ideas embodied in the Protocol by the ICRC represented an improvement on common Article 3, which itself had introduced important new ideas in 1949.

2.22 One expert considered that the extension of humanitarian law to non-international armed conflicts implied that these were defined in relation to two extremes, on the one hand, that of riots or internal disturbances and, on the other hand, that of international armed conflicts, it being understood that the question under discussion was not the principle of the application of humanitarian law to non-international armed conflicts, but the methods of application and the scope of the rules.

2.23 Another expert, following a similar line of thought, considered that internal tensions should be categorically excluded and, at the same time, that, in the case of a civil war, if the state of belligerency was recognized, the rules of international armed conflict should be applied, each type of conflict implying corresponding rights and advantages.

*The question of the « field of application » of the Additional Protocol to common Article 3 was the main subject of discussion throughout the proceedings of Commission II. The interdependence of the Protocol's field of application and its content was repeatedly stressed. While some experts declared that they could not pronounce on the field of application so long as the content of the Protocol was not known, others deferred their decision on certain provisions pending settlement of the field of application.*

2.57 It was widely felt that the ICRC document provided a good starting point despite the amendments that, some experts considered, needed to be made.

2.58 Explaining his proposal, CE/COM II/2, that the Protocol be given the same application as common Article 3 of the Geneva Conventions, the author thereof said that such intent was clear from paragraph 1 of the proposal. He then went on to mention the same situation as that described by the ICRC after the term " in particular ", the basic protection of the Protocol not requiring any more detailed definition. The purpose of paragraph 3 of the proposal was to grant the ICRC the right to take initiative in the same way as did Article 9 (9/9/10) of the Geneva Conventions,

which in no way trespassed on the principle of the sovereignty of States, as the proposal required the consent of the Parties involved in order to be implemented. An expert raised an objection to the paragraph 3 under discussion, to the effect that the point involved should be removed from Article 1 and considered in connection with the question of supervision.

2.59 One of the experts pointed out that all definitions contained ambiguities; the more they were defined and reaffirmed the more difficult it would become to have the Protocol applied and the easier it would become to avoid applying it. He therefore felt that a formula offering the least number of difficulties, rather than an ideal solution, should be sought. Criticizing certain incongruities in the ICRC definition, including the use of the term " in particular " which, by its very nature, was likely to water down the conflicts mentioned in common Article 3, the expert submitted a proposal of his own (CE/COM II/1). This proposal suggested that the definition be separated from Article 3, common to the four Conventions, and that the Protocol should become complete unto itself and should apply to all armed conflicts to which Article 2 was not applicable. The wording of the proposal was shown to be very close to that of the ICRC text, except however for the removal of the term " of a collective nature " which, in the basic draft, qualified hostilities. Paragraph 2 of the proposal explicitly excluded isolated incidents or situations of internal disturbance or tension, thus meeting with the arguments of the partisans of the idea of duration. Moreover, by not detracting from the application of common Article 3, the draft was attempting to put the Protocol on the same footing as the 1949 Conventions. The fourth paragraph of the proposal stipulated that the application of the Protocol would not affect the legal status of the Parties to the conflict. Finally, a new provision, to be included in Chapter I, stressed the mutual obligations of Contracting Parties to respect the Protocol and the obligation of all Parties to an armed conflict, to which the Protocol would be applicable, to ensure that the conditions thereof were respected. Referring to Article 2 on the personal field of application as drafted by the ICRC, he drew attention to the question of the territorial scope of application of the Protocol and considered it inconceivable that, in the case of a disturbance in one specific

part of a territory (in a town, for instance) the whole territory of the State should be subjected to the application of the Protocol.

2.60 Another expert was clearly in favour of the suggestion that the Protocol be dissociated from common Article 3, for he felt that it would be preferable to let Article 3 continue to exist in its own right as specified in the 1949 Conventions. Article 3, which imposed a minimum of humanity, should be applicable even in cases of riots and domestic tension. Moreover, the separation of the Protocol from Article 3 would make it possible to avoid weakening the scope of Article 3 when laying down precise rules on conflicts.

2.61 The question was raised as to whether it might not be as well to reconsider the title of the Protocol and to treat it as a Fifth Geneva Convention.

2.62 Some experts felt that the field of application of the Protocol was based on common Article 3 which it simply supplemented, and that it was inadmissible that the field of application of the two instruments should be separated.

2.63 The author of proposal CE/COM II/5 recalled that the purpose of Article 1 of the ICRC text was to elaborate and supplement the application of common Article 3 and not to restrict the application of the Protocol to the conflicts to which that Article was applicable. The purpose of the Conference was, in fact, " to reaffirm and develop humanitarian law applicable in armed conflicts " and, although reaffirmation might prove somewhat difficult in certain matters relating to the law of The Hague, it was essential where the law of Geneva, applicable to armed conflicts not international in character, was concerned. The concept of sovereignty and non-interference, a quite legitimate notion, had frequently hindered the specific application of common Article 3. On those grounds, he asked that the term " in particular " be struck out. Furthermore, he struck out of his own proposal the territorial reference, envisaging the application of the instrument even on the high seas, and the idea of hostilities " of a collective nature " which might prevent the application of the Protocol to serious though sporadic cases of hostilities. However, he did maintain, as a necessary condition for the application of the Protocol, the idea of organized armed forces

under the command of a responsible authority, in the hope that such an idea would not be interpreted too narrowly. He considered, moreover, that it would not be wise to include an explicit provision in Article 1 of Protocol II, to the effect that the Protocol should not be applied to isolated incidents and situations of internal tension as, there again, he feared that Governments might find a loophole to limit the application of the Protocol. His proposal was aimed at creating a protocol with a broad scope, applicable to all types of *hostilities*—the latter term not being defined—between organized armed forces commanded by responsible authorities (international law not being applicable); such a proposal, implying a very wide application of the Protocol, would have to be very limited in its strictly legal content and should contain only humanitarian provisions.

2.64 The various proposals and the contradictory comments evoked thereby created a general feeling that the final decisions to be taken depended on two basic hypotheses. Either the definition chosen could allow for a wide field of application, in which case the rules for protection would no doubt be more limited, or the definition could be narrower, in which case greater latitude might be allowed in applying the protection.

**Commission III**

*Commission III was responsible,* inter alia, *for questions relating to the protection of the civilian population. Here the first question that arose was that of defining the civilian population. The International Committee of the Red Cross had submitted the following proposal to the experts:*

Article 41.—Definition of the civilian population

1. Any person who is not a member of the armed forces and who, moreover, does not take a direct part in hostilities is considered to be a civilian.

2. The civilian population comprises all civilians fulfilling the conditions stipulated in the foregoing paragraph.

3. Proposal I: The presence, within the civilian population, of individuals who do not conform to the definition given in paragraph 1, does not prevent the civilian population from being considered as such, reservation being made for Articles 45 (paragraph 5), 49, 50 and 51 of the present Protocol.

Proposal II: The presence, within the civilian population, of individual combatants, does not prevent the civilian population from being considered as such, reservation being made for Articles 45 (paragraph 5), 49, 50 and 51 of the present Protocol.

4. In the case of doubt as to their civilian character, the persons mentioned in paragraph 1 shall be presumed as belonging to the civilian population.

3.116 All the experts who were in favour of the idea of a definition advocated a negative formula, the civilian population being defined as those persons who did not take part in hostilities. One expert felt that the original proposal met the criterion of precision, both in its form and in its substance, and that it clearly reflected the notion of sufficient causality set out in the ICRC Commentary. In the opinion of this expert, the expression " take a direct part in hostilities " was adequate, but it should perhaps be illustrated by some example: spying, recruitment, propaganda, the transport of arms and of military personnel. The expression " take part in the fighting or in military operations " was too narrow and the formula " participate in the military effort " too broad. The criterion to be used should also be applicable in guerrilla warfare, it being understood that the civilian population might play an indirect role by providing aid, medical care or food supplies to protected persons, as allowed under the law in force and as provided for in Article 20 of Draft Protocol I.

*In order to ensure that the living conditions of the civilian population are bearable, objects of a civilian character should be protected. This definition of objects of a civilian character is closely connected with that of military objectives.*

*The ICRC had decided to define the two concepts, since two explanations were better than one, a view which was supported by some of the experts. Others, fearing that the juxtaposition of the*

*two definitions might establish intermediate objects whose position would be ambiguous, proposed that one or the other be deleted.*

3.128 Three experts proposed simply the deletion of the article on objects of a civilian character (CE/COM III/PC 22, 29 and 51) since, in their view, the concept of such objects flowed indirectly from that of military objectives (see below, Article 43). They declared that that course would be more favourable to the civilian population, for a positive definition of objects of a civilian character ran the risk of being either incomplete or open to a restrictive interpretation. Another expert put forward the idea of an expressly negative definition of objects of a civilian character as follows:

" All objects which do not directly produce weapons, military equipment or means of combat, or are not directly and immediately employed by the armed forces are considered to be non-military objects " (CE/COM III/PC 44).

3.129 Others felt that it would be preferable to strengthen the definition of objects of a civilian character since only that aspect was relevant to the purpose and context of the Conference. In order to restrict the list of military objectives, what was necessary, they believed, was to make the list in the present text of Article 42 as exhaustive as possible; at present it was purely illustrative. The criteria of nature and use were generally considered to be appropriate. An amendment was submitted expanding the ICRC draft as follows:
" Objects which by their nature and use are indispensable for the survival of the civilian population comprise, for example, crops, provisions and foodstuffs, as well as facilities and installations for their production and storage, drinking water reserve supplies, dwellings, buildings and objects designed for the shelter of the civilian population, for cultural purposes, for education or social and health services " (CE/COM III/PC 34).

An amendment not enumerating such objects was also submitted:

" Objects reputed to be non-military are those necessarily or essentially designed for and used predominantly by civilians " (CE/COM III/PC 4).

*It is not enough to define the civilian population; it must also be respected. The ICRC therefore prepared a draft article on respect for the civilian population, reading thus:*

Article 45.—Respect for the civilian population

1. The civilian population as such, as well as individual civilians, shall never be made the object of attack.

2. In particular, terrorization attacks shall be prohibited.

3. Attacks which, by their nature, are launched against civilians and military objectives indiscriminately shall be prohibited.

4. Attacks directed against the civilian population or individual civilians by way of reprisals shall be prohibited.

5. Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective.

3.154 The suggestions made in relation to Article 45 might be grouped into three categories: the first concerned the actual concept of the article; the second contained two sets of proposals with regard to paragraphs 2, 3 and 4, to widen their scope, or, on the contrary, to narrow it or delete the paragraphs; the third category referred to paragraph 5, proposing its deletion (this seemed to be the dominant view), its insertion elsewhere, or its retention.

3.155 A few experts thought that the principle contained in paragraph 1 would be sufficient and that the explicit prohibitions in paragraphs 2, 3 and 4 should be deleted (CE/COM III/PC 6 and 29) or, in the case of two experts, that paragraph 3 at least be omitted (CE/COM III/PC 50), as this paragraph aimed ultimately to forbid, indirectly, weapons the study of which was not within the Commission's competence.

3.156 Other experts proposed strengthening paragraphs 2, 3 and 4 (which should have been sub-paragraphs of paragraph 1), for example, by adding in paragraph 3 a prohibition on the bombardment of zones (CE/COM III/PC 37), an idea contained in Article 50(2) of Draft Protocol I (the same experts considered that the rest of this Article 50 should be omitted in the case of paragraph 1, or completely redrafted, in the case of paragraph 3). Two further notions were put forward for strengthening this provision. One

was to forbid attacks of a character which would destroy or disturb the natural human environment, the other, to extend the prohibition contained in the existing regulations (Article 49 of the Fourth Geneva Convention) concerning the evacuation or forced removal of the civilian population (CE/COM III/PC 33).

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*In conclusion, we quote from the Report some of the experts' opinions as to future prospects:*

5.47 In the opinion of a large number of experts, work had reached a stage which warranted the convening of a diplomatic conference. In view of the fact that the countless amendments and proposals submitted to the Conference had not been discussed in sufficient detail, and that it would therefore be very difficult for the ICRC to find a common denominator, some experts felt that some further meetings of experts should be held before a diplomatic conference was convened. The opinion was voiced that a diplomatic conference should be held not later than 1974, in order that the present impetus might not be checked and the efforts made so far not founder in indifference or oblivion. The Report on the Conference should therefore be distributed to Governments at an early date.

The Swiss expert declared that the Swiss Government was prepared to convene the Diplomatic Conference and to make preparations for that gathering.

5.48 Several experts spoke about the way in which future texts should, in their opinion, be submitted. Some of them expressed the opinion that the ICRC should draw up clear and unequivocal texts with very brief comments.

Special stress was laid on the need for precise definitions. Expressions such as " combat zone " and " military objective " should be more accurately defined. Some experts suggested that the ICRC submit various options. One expert, however, thought it preferable for the ICRC itself to make a choice, which would not necessarily be the outcome of the different opinions. Rather than a compromise solution, it should strive for a common denominator acceptable

to all Parties. The Diplomatic Conference itself would seek the necessary compromise solutions. Attention was also drawn to the need to reconcile the philosophical and practical aspects of international humanitarian law applicable in armed conflicts. In this context, an expert pointed out that it would be desirable to introduce into the Draft Protocols which were to be prepared a provision based on the Martens clause. It was also necessary to bear in mind the causes underlying armed conflicts and to consider the relative application of law in some countries. An expert urged the need for the ICRC to elicit genuinely progressive elements from the Conference and to reject certain trends to the effect that in present-day armed conflicts the civilian population as such would no longer exist. The ICRC should also endeavour to overcome certain shortcomings that still existed, such as the inadequacy of the protection and marking of hospital ships, and to find flexible solutions ensuring maximum protection. Future rules should constitute neither a law for the minority nor a law for the majority, so that they might be acceptable to virtually all States. An expert pointed out that in developing international humanitarian law applicable in armed conflicts one had to bear in mind the means rather than the aims of those conflicts, and that special provisions governing armed conflicts springing from special motives would be unacceptable. It was recalled that neither the principles of reciprocity and of the balance and equality of rights and obligations nor the reasons underlying an armed conflict had any place in international humanitarian law, which had to be in force for all and to be applied without discrimination. The same expert further advised against any declarations containing general or commonplace sentiments. and therefore of no practical effect.

5.49 Several experts recommended that, in drawing up future texts, the ICRC should bear in mind the principles of respect for sovereignty and of non-interference, while others deplored their insistence and urged that humanitarian considerations should come before respect for the sovereignty of States.

5.50 Some experts drew attention to the fact that the work of the United Nations and the ICRC was becoming increasingly interdependent; one expert said that final responsibility regarding

the development of international humanitarian law applicable in armed conflicts should rest with the ICRC.

5.51 An expert expressed the wish that the goodwill which the experts had shown during the two sessions of the Conference might continue to prevail in the work which lay ahead.

5.52 Referring to the Conference generally, an expert said that his delegation had tried to show facts as they were, even at the risk of being unpopular. This method served the ICRC better than the practice of making vague statements or concealing facts. According to the expert, all those taking part in the Conference pursued the same aim: that of strengthening the protection due to the victims of armed conflicts. The reason for differing opinions lay not in the objective pursued but in the different ways of achieving it. Differences arose from historical developments and the political, social, military and, above all, psychological experience of States. Thus the problem of civil protection was seen from a different standpoint according to whether or not States had recently experienced armed conflict. It was essential that an effort be made to understand the position of other States and find a solution to meet the needs of one and all.

5.53 According to another expert, the Conference had provided very useful exchanges on legal as well as military and technical problems. It had been more difficult to find a common denominator in the matter of drawing up new rules for limiting human suffering. There would always be different views on concepts such as " necessary or tolerable suffering " in armed conflict. There had been exchanges of ideas in the course of which different interests had confronted each other. Some States wished to retain their freedom of action because they enjoyed a certain advantage, while others attempted to limit that freedom of action. Military interests had often clashed with humanitarian considerations, and those who upheld humanitarian interests were deemed unrealistic. The expert, however, considered that realism lay, above all, in an increased capacity to understand the sufferings of victims of armed conflicts.

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