

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

**II**

**CONFERENCE OF GOVERNMENT EXPERTS**

*In our October issue, we reproduced some passages from the volume published by the ICRC on the proceedings of the Conference of Government Experts held in Geneva, from 24 May to 12 June 1971. These related to the proceedings of Commissions I and II. We give below some excerpts from the record of Commission III and of the final plenary meetings.*

**COMMISSION III**

**PROTECTION OF CIVILIAN POPULATION AGAINST  
DANGERS OF HOSTILITIES**

**General discussion**

409. The general discussion began towards the end of the first meeting on Wednesday afternoon, 26 May, and continued in the second and third meetings. It mainly concentrated on questions raised in the relevant chapters of Document III and on the ICRC proposals on pages 124 to 128 of the English text.

410. In their introduction, the ICRC experts stressed the need to reaffirm and develop the rules relating to the protection of the

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civilian population, in spite of all the difficulties which may have to be overcome. They referred to the progress which had been made since the 1956 Draft Rules, such as Resolution XXVIII of the XXth International Conference of the Red Cross, and U.N. General Assembly Resolutions 2444 (XXIII) and 2675 (XXV), all of which had been adopted unanimously. The rules proposed by the ICRC were designed to meet such situations as those which had been encountered in the armed conflicts which had occurred since the Second World War (See Doc. I, "Introduction", Chap. IV/1).

411. Several problems were specifically put to the experts: the field of application of the basic rules; the situations covered; the links those rules would have with prevailing legal instruments; the degree of urgency to be attributed to the study of illicit targets, that is to say, objectives which it is forbidden to attack.

412. In general, the necessity of reaffirming and developing provisions for the protection of the civilian population was emphasized, particularly because there was no instrument embodying that subject as a whole. The representative of the United Nations Secretary-General considered, moreover, in the light of the texts adopted by the General Assembly, that it was generally agreed that the plight of a suffering population should be alleviated as much as possible in time of war. The view was held that a protocol should take into account the various situations and forms of warfare (conventional, guerrilla, blockade) and three of the experts stressed the objective, namely: the protection of the civilian population against the dangers arising from hostilities. Consequently, one of them suggested that the title of the protocol should be changed from "Protection of the Civilian Population in Time of Armed Conflict" to "Protection of the Civilian Population Against the Dangers Arising from Hostilities". Another expert was of the opinion that, in this respect, a repetition of the provisions of the Fourth Geneva Convention should be avoided.

413. One expert stated that it had been wise, in the study and in the concrete proposals contained in Document III, to stress the illicit objectives, namely civilians and civilian objects.

His view was shared by another expert who expressed some doubt about the value of proposals relating to military objectives.

414. Many experts spoke on the importance and necessity of applying the law in force. There was, in their opinion, no doubt that the principles contained in several resolutions of the United Nations General Assembly, the International Conference of the Red Cross and the Institute of International Law were the expression of positive law, both written and unwritten. Some experts considered that implementation of the law should be given priority over its reaffirmation and development; another insisted that the implementation of provisions in force should be subject to scrutiny. Yet another proposed studying the legal provisions which are violated during armed conflicts and the motives behind such violations. Another expert stated that consideration should also be given to the covenant on civil and political rights containing minimum rules for protection and not only to the rules of positive law. A representative of the ICRC pointed out that there were already rules restricting the conduct of military operations and that, therefore, what was especially required was to reaffirm and develop them.

415. One expert emphasized that the development of standards of civilian population protection during international armed conflict should be based both on the prevailing general international law forbidding aggression and on humanitarian law developments. In his opinion, the matter involved was increased protection for the civilian population of a State which was the object of aggression.

416. Several experts said that proposals should be realistic and based on experience in order to be applicable to actual situations; the law in force could be better applied through national and international measures. A question which arose was: what experience should be taken into account? The ICRC representative pointed out that some military authorities had taken a long time to realize that indiscriminate bombardment of towns during the Second World War did not, in fact, achieve military ends; he was of the opinion that where a method of warfare had not been put to the test, the adage *in dubio pro reo* should be taken as a guide;

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in other words, in the interest of the civilian population, it should not be used.

417. Referring to the field of application of the fundamental rules of the Protocol for the protection of the civilian population, a representative of the ICRC stated that that instrument had been devised for all armed conflicts, without distinction between those which were international and those which were not. This approach was based on the relevant international resolutions, which did not make this distinction concerning the civilian population, and it corresponded with the views expressed by the Secretary-General in his second report (A/8052, paras. 41 and 42), as well as by all the experts consulted by the ICRC in 1970. Among the experts who gave an opinion there appeared a wish supporting the idea of covering all armed conflicts, though another tendency expressed doubts on the subject. It should be noted that this divergence of opinion appeared several times in the debates. The representative of the Secretary-General of the United Nations stated that, in this regard, he completely shared the views of the ICRC.

418. The question of linking the Protocol with the legal instruments in force was also taken up in the general discussion. A representative of the ICRC drew attention to the three possibilities which could, theoretically, be envisaged: first, to link it with the Fourth Geneva Convention of 1949; secondly, to link it with the Regulations annexed to the Hague Convention of 1907 (Convention Regulations No. IV); thirdly, a separate Protocol could be devised. Some experts supported the first possibility, others the last one; the second, however, received no approval. Differing views were expressed later in this regard.

419. In general, the experts hoped that precise preliminary provisions would be submitted to them in order that they might express their views with a full knowledge of the facts. One of them felt that it might be dangerous to split the Protocol into basic and operative rules because the provisions embodied in the latter might be considered limited, which would restrict their scope. He therefore preferred not to proceed with the separation. Several suggestions were made concerning the penal provisions. One expert proposed that violations of the basic rules should no longer be subject to

prescription; the representative of the United Nations Secretary-General expressed the hope that a provision might in any event stipulate the prohibition of the death sentence for minors and pregnant women and that another might reaffirm the principle of the non-retroactivity of penal law.

420. Several questions of substance were dealt with also. They concerned three groups of problems. Firstly, illicit objectives, covering the distinction, definition and protection of the civilian population and property; secondly, illicit methods, concerning weapons, famine and terrorisation; and thirdly, measures for strengthening the protection of the civil population concerning the respect and safeguard of such a population, and zones of refuge.

421. Even though, as was pointed out by many experts, it was very difficult, in practice, to make a distinction between civilians and persons engaged in military operations in the new forms of armed conflict, it was agreed that such distinction fell within the ambit of positive law. Some experts considered that it was necessary to define the civilian population. One of them expressed a preference for the second amended ICRC version and approved the idea of providing a definition, with concrete examples, of non-military objectives. In discussing the protection to be granted to civilians, many experts considered that account should be taken of the different situations in which civilians might be found. They might be either inside or outside the fighting area and they might participate in the military effort or even in actual military operations. While one expert felt that protection of the entire population should be considered, others believed that various types of persons should be taken into account. The representative of the United Nations Secretary-General mentioned refugees and journalists and another expert distinguished three types of persons who quite obviously had nothing to do with the fighting: owing to their condition (children, women and old people), owing to their function (medical, para-medical and civil defence staff), and owing to their situation (wounded, sick and prisoners).

422. Several experts spoke on the question of arms. While admitting the importance of the problem for the civilian population, they differed as to how the matter should be tackled. Some of

them believed that that subject was principally the concern of other international bodies such as the SALT, the CCD and the United Nations General Assembly, while others believed that the prohibition of weapons of mass destruction should be ceaselessly proclaimed. Some experts expressed the wish that those arms that were not specifically examined by those bodies should be considered by the Commission. One expert proposed that the ICRC draw up a document on the introduction into the humanitarian law of armed conflicts of a provision prohibiting the use of weapons of mass destruction. He underlined the fact that the necessity to reinforce the concept of civilian population made it essential to prohibit such weapons. It was, in the opinion of one expert, necessary once again to invite those States which had not adhered to the 1925 Geneva Protocol, to do so. Famine and terrorism were mentioned among the methods considered as illicit owing to their effects on the civilian population.

423. When discussing ways of strengthening the protection of the civilian population, some experts mentioned respect and safeguarding measures. Such measures imposed reciprocal obligations on all parties to a conflict. The representative of the United Nations Secretary-General stated that the establishment of refuge zones, already feasible in peace time, had been advocated in the Secretary-General's Report A/8052, Chapter IV. In his opinion, that was the most effective way to guarantee fully the protection of the population, and he pointed out that the moving of populations was considered only on the basis that it would be a purely voluntary measure.

#### **PROTECTION OF THE CIVILIAN POPULATION AGAINST CERTAIN BOMBARDMENTS AND WEAPONS**

472. The tenth meeting was devoted to examining the protection of the civilian population against certain bombardments and against the effects of certain weapons; both questions were set out in the relevant chapters of Document III.

473. Several experts put forward a number of considerations concerning both subjects. One of them wondered whether it was the

right moment and the right place to deal with such complex and controversial matters which, though of vital importance, would tend to delay or compromise work relating to the protection of the civilian population. On the other hand, another expert declared that, in his opinion, positive international law already prohibited indiscriminate bombardments and weapons; their prohibition was the logical consequence of the principle of distinction between persons belonging to the civilian population and those engaged in hostilities; he was of the opinion that the ICRC, as it proceeded in its work, should therefore put forward precise and detailed provisions. In the view of another expert, the relevant ICRC proposals of 1956 represented a maximal approach, those of 1971 a minimal approach: a *via media* should be found; specific prohibitions might be envisaged in the same way that the prohibition of dum-dum bullets had been provided for in the past. Some experts thought that articles 6 to 8 of the resolution of the Institute of International Law (cf. Document III, Annex XXIV), which were aimed at indiscriminate methods and weapons, might be added to the fundamental rules, and they hoped it would be expressly stated that the rules would thus be reaffirmed; the omission of that point would, in their opinion, lead to dangerous ambiguity. In introducing the subject, the ICRC representative had been anxious to stress that the fundamental rules previously studied were so conceived as to cover every situation, and that consequently the proposals relating to illicit means and methods were intended solely to complete the rules and make them precise, without introducing the slightest derogation.

474. As regards the question of bombardments, the experts were invited by a representative of the ICRC to give their views on the scope of the relevant provisions of the Hague Conventions of 1907 (adopted at a time when artillery was still at an early stage of development and war planes had not come into existence), and on articles 10 and 6 of the Draft Rules of 1956 and articles 8 and 6 of Resolution No. I of the Institute of International Law, all of which related to the bombardment of zones and to terrorization. (Cf. Document III, Annexes XIX and XXIV.)

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475. According to one expert, the provisions of the Draft Rules of 1956 regarding zone bombardment and terrorization should be included in the fundamental rules; they would cover what are known as *free-fire zones*. The representative of the Secretary-General of the United Nations pointed out that paragraph 42 of the second report (A/8052) dealt with the question of saturation bombing. One expert thought that if all indiscriminate bombing were prohibited, that would cover strategic bombing; but, he continued, as long as economic warfare remained a paramount factor in the outcome of hostilities, such bombing would represent a very effective method of warfare, as experience in the Second World War had shown; hence, a problem did exist although a way could, perhaps, be found for its solution; he realized, however, that it was urgent that an appropriate body should take up the question.

476. The ICRC representative pointed out that the Red Cross was deeply conscious of the importance of the question of weapons, as it had been from its earliest days. In accordance with Istanbul resolution XIV, which in particular requested the United Nations to pursue its efforts in the field of weapons of mass destruction and the ICRC to devote great attention to the question, the ICRC had followed closely the work undertaken by various international organizations, both intergovernmental and non-governmental, cited in Annex XXV to Document III. He referred to the specific steps taken regularly by the ICRC to promote universal accession to the 1925 Geneva Protocol, the latest step having been taken in 1970. The experts were invited to give their opinion on the concrete proposals of the ICRC set out on page 117 of the English text, and on those put forward by the experts of National Red Cross, Red Crescent and Red Lion and Sun Societies at the Hague Conference (1-6 March 1971) and which appeared in Chapter IV/D of the report on the work of that Conference.

477. As was the case during the general discussion, three tendencies were confirmed regarding the question of weapons, in particular weapons of mass destruction. According to the first tendency, biological, chemical and nuclear weapons should not be the subject of discussion at the Conference of Government Experts called by the ICRC, at least for the time being, since they were being studied

by other bodies such as the CCD. Those inclining to the second tendency likewise recognized that a solution could not be found within the Commission; they held that since better protection of the civilian population essentially depended on the non-utilization of weapons of mass destruction, it would be appropriate to affirm the necessity for their prohibition. Bearing in mind that the use of any kind of chemical and biological weapons had been expressly prohibited by the 1925 Geneva Protocol, it was also suggested that the States which had not yet done so should be invited to accede to the 1925 Geneva Protocol. The third tendency drew a distinction between weapons which were being studied and discussed by CCD or other bodies, such as biological, chemical and nuclear weapons, and those which were not under study by any body, such as anti-personnel and delayed-action bombs; public opinion would be greatly disappointed if neither the United Nations, nor CCD, nor any other body took up the question of those weapons. One expert, referring to the proposal of the Secretary-General of the United Nations to undertake a study of the question of napalm, considered that all weapons (not solely incendiary weapons) not at present the subject of discussion should be studied with the closest attention. Finally, several experts, without expressly endorsing any one of those tendencies, thought that, at all events, it was incumbent upon them to express an opinion on the subject of weapons; one delegate referred to the fear assailing countries which, though not engaged in armed conflict, would nevertheless suffer the effects of weapons of mass destruction, the use of which should not be authorized. Two other experts put forward a more precise proposal.

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## FINAL PLENARY SESSIONS

### I. Introduction

581. When the four Commissions had completed their proceedings, three final plenary meetings were held to consider the following agenda items:

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- (1) Commission reports,
- (2) Follow-up action,
- (3) Miscellaneous matters.

582. At the first of the three plenary meetings, the four rapporteurs submitted their reports and a summary of each Commission's work. Each report was open to discussion but no fundamental issue was debated since the reports had already been approved by the respective Commissions.

583. The President of the ICRC then addressed the Conference as follows:

“ Now that this conference is drawing to a close, the time has come to explain briefly how the International Committee of the Red Cross intends to follow up your discussions. The work of the conference has shown that solutions are possible and desirable and that it is therefore necessary to continue the work to reaffirm and develop humanitarian law.

The ICRC will draw up a full report, the gist of which will comprise the reports of the four Commissions. It will be sent to the Governments of all States parties to the Geneva Conventions and will be available to the United Nations. Those Governments, whether they took part or not in this conference, will be invited to make known their opinions and any suggestions, in accordance with resolution XIII of the XXIst International Conference of the Red Cross at Istanbul in 1969. It is in fact our wish to associate them in our efforts. The same applies to all the National Red Cross Societies to which the report will also be conveyed.

The headway made by the conference has been somewhat varied.

For instance, two draft protocols have been drawn up in Commission I on the protection of the wounded and the sick, whereas the important problem of medical aviation was hardly approached. On that subject, the ICRC has been requested to draw up a draft with the assistance of specialists.

While Commission II devoted much of its time to non-international armed conflicts, it hardly glanced at the problem of guerrilla warfare, which is of acute concern to us. In addition, the

problem of internal disturbances, to which the ICRC attaches great importance, was not broached.

In Commission III, the subjects as a whole were dealt with, and in a field which in our opinion is essential, namely the protection of civilian populations, the results were encouraging. There too, the ICRC has been asked to draw up more detailed drafts.

Commission IV covered its agenda without however reaching precise conclusions on some items. The ICRC has been invited to carry on its studies, possibly by sending a questionnaire to Governments.

The considerations which I have just outlined clearly lead to the conclusion that a second session will be necessary. This, incidentally, we had expected when sending out our letter of invitation, and many experts expressed the wish for such a second meeting.

In the circumstances, I wish to inform you that the ICRC has decided to convene that session. In view of the arrangements which will have to be made by one and all, it could take place in April or May next year. The meeting place I may inform you, after consulting the Government of the Netherlands, will be Geneva. Attendance could also be on a broader basis. The ICRC will shortly examine the question but would be pleased to know right away any suggestion you may have. It would be expedient to allow for a slightly longer session than the present one.

The ICRC will endeavour to draw up for the next session a series of draft protocols bearing in mind as far as possible the various opinions expressed here but without necessarily proposing compromise solutions or seeking systematically a kind of common denominator easily acceptable to all Parties. Each article will be accompanied by a brief comment but, of course, the eight fascicles which you have received will still be the basic documentary material as well as, of course, the report on the present conference.

That is the programme which the ICRC intends to follow in the immediate future; it goes without saying that it will devote its full attention to any remarks which you may make during the present proceedings. It intends also to continue its close and fruitful collaboration with the Secretary-General of the United Nations and with the Human Rights Division. In this connection, it should be

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noted that the twenty-sixth session of the General Assembly will again have on its agenda the protection of human rights in armed conflict. The ICRC would be pleased if the Governments which kindly delegated experts to this session would be in favour of the adoption by the General Assembly of a resolution which takes into account the programme which I have just had the honour of explaining to you. ”

584. The last two items on the agenda were merged and discussed by the second and closing sessions. A summary of the proceedings is given below.

### II. Progress

#### A. *General Considerations*

585. The experts expressed their satisfaction at the outcome of the Conference. Two of them pointed out that it was the first time for a quarter of a century that a conference had met to discuss international humanitarian law problems. During that long period, one of them stated, the Geneva Conventions had proved their worth but also their shortcomings. It was therefore necessary, he added, both to adapt the rules to new types of conflict and to draw up new rules. In the view of another expert, the conference was the first step in that direction; the starting signal had been given for the drawing up of important documents with a view to improving the Geneva Conventions; results had even exceeded hopes, for common trends had emerged and certain texts had been found acceptable. The Conference had shown, he said, that difficulties were not insuperable; that there were genuine chances of reaching agreement.

586. Another expert pointed out that at that stage unanimity on all proposals could not be expected and that considerable thought and exchanges of views were always necessary for international negotiations to result in agreement. However, common denominators had been found for many points. According to another expert, one important aspect of the conference had been the exchange of views among the experts and the general survey carried out by

them. One expert particularly appreciated the spirit which had prevailed throughout.

587. Although one expert expressed regret that in some subjects both the material prepared by the ICRC and the discussions in commission were sometimes lacking in realism, insufficient account having been taken of military requirements and of specialist opinions on the subject, those experts who took the floor considered, on the whole, that even though some points had not been thoroughly studied—it having been hardly possible to do so—the conference had been productive. In this connection, one expert mentioned its educational effect and another compared it to a seminar.

### *B. Results*

588. Some experts, speaking at length on results, were particularly satisfied with the two draft protocols adopted by Commission I. The first of these is related to the protection of the wounded and the sick (CE/Com. I Report-Annex I) and intended to supplement the Fourth Geneva Convention; the second is related to non-international armed conflicts (CE/Com. I Report-Annex II), and designed to supplement Article 3 of the four Geneva Conventions. The United Nations Secretary-General's representative shared the feeling of satisfaction.

589. Other experts were particularly appreciative of the proposals submitted by their colleagues in the various Commissions, especially of CE/Com. III/44 submitted to Commission III; the draft protocol defining non-international armed conflict (CE/Plen. 2bis); and the draft rules relating to the appointment of Protecting Powers (CE/Com. IV/2) submitted to Commission IV. In this connection, one expert stated that the best results were obtained in the non-controversial fields which did not have a markedly political aspect (Commissions I and III).

## **III. Prospects**

### *A. General Considerations*

590. The need for rules to take into account present-day and predictable future realities was emphasized.

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591. Some experts pointed out that what was most important was to safeguard peace, that respect for human rights was a factor for peace, whereas disregard of those rights, and racial discrimination in all its forms were a serious threat to peace. They therefore underscored the importance of a better application of existing rules. One of them stressed that although new rules were necessary, to ensure their effective application was equally so.

592. The view was held that the difficulty inherent in the problems before the Conference was to a great extent due to the rapid development of fighting techniques, especially in guerrilla warfare, and to the new forms of warfare. One expert hoped that the ICRC would study ways and means of making existing rules applicable to those new forms of warfare, as the right to protection should be identical whatever the type of conflict.

593. It was also pointed out that the development of international humanitarian law should be based on respect for every nation with due regard for the national sovereignty of every State.

594. Another expert laid stress on the importance of disseminating knowledge of humanitarian principles, particularly in universities.

595. Some experts briefly dwelt on problems which were closely connected with those submitted to the Conference.

596. One of them stated that international humanitarian law could not dispense with a distinction between aggressor and victim. Another, underlining the fact that international law forbade aggression, pointed out that there was a close connection between humanitarian action and the prohibition of aggression.

597. One expert expressed the view that to ban weapons which caused excessive harm was a pre-requisite of respect for human rights; another expressed regret that the Conference had not devoted more attention to the problem of weapons of mass destruction.

598. One expert was of the opinion that new regulations should take the form of a protocol additional to the 1949 Geneva Conventions, making the revision of those Conventions unnecessary.

*B. ICRC-UN Co-operation*

599. As at the plenary meetings at the beginning of the Conference, several experts expressed their approval of the co-operation between the UN and the ICRC, which had been manifest, in the opinion of some of them, in the fact that the ICRC had to a considerable extent taken into account, in the documentary material it had prepared for the Conference, the United Nations Secretary-General's two reports A/7720 and A/8052, and in the presence at the Conference of the Director of the UN Human Rights Division, Mr. Marc Schreiber.

600. A number of experts expressed the hope that that co-operation would continue. In that respect, the UN Secretary-General's representative stated that a report on the Conference would be submitted to the UN General Assembly. One expert pointed out that the examination of the Conference's work by the UN General Assembly at its next session was a tangible sign of that co-operation.

601. It was pointed out by several experts that, in view of the wide scope of international humanitarian law, the two institutions could not work in competition but only in concert. The UN Secretary-General's representative asserted that the UN did not seek any monopoly and that the co-operation between the two institutions could only act as a stimulus. According to one expert, nothing but advantage was to be gained from the experience and resources available to the two bodies, for the work ahead, like the expectations, was enormous. In the opinion of yet another expert, joint effort was even essential. The UN Secretary-General's representative drew attention to the need to avoid the setting up of two distinct legal systems, one UN and the other ICRC, as there could in fact be only one international law. He also mentioned that the UN had been called upon to concern itself with international humanitarian law problems solely because that part of the law appeared to be incomplete. In view of the world organization's humanitarian and human rights responsibilities, it could not remain aloof from those questions. The United Nations, seeking only to remedy deficiencies in that field, could not but welcome the work accomplished by other bodies, in particular by the ICRC.

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602. Some experts nevertheless held the view that there were problems which could better be dealt with by one rather than the other of the two institutions. According to one expert, for instance, the prohibition of certain weapons, such as mentioned in Document CE/Com. III/44, should be studied by the UN. The same opinion was held by another expert with respect to the protection of journalists on dangerous missions. For yet another expert, the duty of making public opinion ready and receptive to those problems should also come within the purview of the United Nations.

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