

# INTERNATIONAL COMMITTEE OF THE RED CROSS

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

### DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS

#### COMMENTARY

*In our October issue, we gave our readers a summary of the draft Additional Protocols to the Geneva Conventions of 12 August 1949, prepared by the ICRC. Those Protocols are to be the basis of the work of the Diplomatic Conference which will start its meeting in Geneva on 20 February 1974, and to which all States parties to the Geneva Conventions have been invited.*

*In November, the drafts were examined by the National Red Cross, Red Crescent and Red Lion and Sun Societies which met in Teheran for the XXIIInd International Conference of the Red Cross which, unanimously, approved them in its Resolution No. XIII, the text of which is given elsewhere in this issue.*

*The International Committee of the Red Cross has now published a Commentary on the Protocols, the Introduction to which is quoted hereunder.*<sup>1</sup>

The introduction, which appears at the beginning of the two draft Additional Protocols to the Geneva Conventions of 12 August 1949, published by the International Committee of the Red Cross (ICRC) in June 1973 and sent by the Swiss Government to the States parties to those Conventions and to Member States of the

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<sup>1</sup> *Draft Additional Protocols to the Geneva Conventions of August 12, 1949—Commentary*, ICRC, Geneva, Oct. 1973, 176 pp. Available in English, French and Spanish from ICRC Documents Service. Price Sw. fr. 20.—.

United Nations, in view of the Diplomatic Conference convened by the Swiss Government scheduled to open in Geneva on 20 February 1974, summarizes as follows the work undertaken for the reaffirmation and development of international humanitarian law applicable in armed conflicts:

“ In September 1969, the XXIst International Conference of the Red Cross, at Istanbul, unanimously adopted Resolution XIII requesting the ICRC actively to pursue its efforts with a view to drafting as soon as possible concrete rules which would supplement existing international humanitarian law, and to invite government experts to meet for consultations with the ICRC on such proposals.

On the basis of that Resolution, the ICRC convened for 24 May 1971 the ‘ Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ’, to which it invited some forty governments to delegate experts. As it was unable to cover all its agenda, the meeting requested the convening of a second session open to all States parties to the 1949 Geneva Conventions. This second session took place in Geneva from 3 May to 3 June 1972 and was attended by more than four hundred experts delegated by seventy-seven governments. This large attendance, the sustained work carried out in several commissions, and the constructive atmosphere which prevailed throughout the proceedings gave a decisive impetus to the undertaking.

With those meetings in mind, the ICRC had drawn up a series of volumes on the matters to be discussed. Those volumes, with the reports on the two sessions of the Conference of Government Experts, still constitute the basic documentary material.

In addition to the two sessions of the Conference, the ICRC arranged a number of consultative meetings with individuals and groups. In particular, in March 1971 at The Hague and in March 1972 at Vienna, it submitted its drafts to Red Cross experts in order to have their opinions. Similarly, in November 1971, it consulted the representatives of non-governmental organizations.

The ICRC also remained in close liaison with the United Nations and followed attentively the work of the General Assembly in this field. At each of its sessions, since 1968, the General Assembly has

adopted resolutions on 'respect for human rights in armed conflicts'. This was a powerful encouragement to the ICRC to continue its work.

Each time, the United Nations Secretary-General submitted to the Assembly very detailed reports containing useful suggestions. In addition, representatives of the United Nations Secretary-General actively participated in the two sessions of the Conference of Government Experts convened by the ICRC.

Today the ICRC is able to present the result of several years' joint effort, in the form of two draft Additional Protocols to the 1949 Geneva Conventions; these drafts are given in the pages which follow. Their sole aim is to provide an adequate basis for discussion at the forthcoming Diplomatic Conference convened by the Swiss Federal Council, the Government of the State depositary of the Geneva Conventions. They will also be submitted to the XXII<sup>nd</sup> International Conference of the Red Cross which will meet in Teheran in November 1973. "

To ease the task of those who are to study the aforementioned draft Protocols, the ICRC has thought it useful to establish a *Commentary*, which it herewith takes pleasure in submitting. Being succinct, it does not embody prefatory remarks, nor does it claim to interpret the texts. To be fully conversant with the subject, reference will need to be made to the two *Reports on the Work of the Conference of Government Experts*, which contain, *inter alia*, the various proposals put forward by the experts; reference should also be made to the eight volumes of basic documents established by the ICRC in 1971.

The *Commentary* contains what seemed essential to an understanding of the provisions submitted. It is, above all, a statement of reasons. As a general rule, it also indicates the source of the article or paragraph concerned. Where appropriate, it shows in what manner they differ from the previous texts.

Some experts having expressed the wish that a more thorough study of the relation between the draft Protocols and other instruments of positive law be made, we would point out that the matter of the relation of the draft Protocols to the 1949 Conventions is dealt with in the Preamble and in Article 1 of both draft Protocols,

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and suggest that reference should be made to the commentary thereon. The relation to the Hague Conventions and to customary international law is explained in the introduction to Part VI of Draft Protocol I, and in the commentary on Articles 2 (c) and (d), 32 (4), 33 to 53, 64, 66, 70 and 77 of that draft.

As regards the field of application of the two drafts, it is laid down in Article 1 of Draft Protocol I and Articles 1 and 2 of Draft Protocol II. Broadly speaking, the substance of Draft Protocol II consists in provisions which have been drawn from the Conventions and from Draft Protocol I, but adapted to the specific conditions of non-international armed conflicts, and hence in most cases simplified.

It should be recalled that, apart from some provisions of a general nature, the ICRC has not included in its drafts any rules governing atomic, bacteriological and chemical weapons. These weapons have either been the subject of international agreements such as the Geneva Protocol of 1925 or of discussions within inter-governmental organizations. This, however, does not imply that the ICRC or the Red Cross as a whole is not interested in a problem whose humanitarian aspects are of paramount importance.

Also, the so-called conventional weapons, which may nevertheless cause unnecessary suffering or have indiscriminate effects, are still not covered by the draft Protocols. Yet they are also a matter of concern for the ICRC, which, with the co-operation of some experts, has carried out a study in which such weapons and their effects are described. A detailed report on the subject has recently been sent to all Governments, which will need to decide on the action that should be taken and can refer it to any bodies they may consider appropriate. The ICRC considers that, should Governments wish to bring up at the Diplomatic Conference the question of the restriction or even prohibition of some of these weapons, the Conference could devote a general discussion to the question. A working group could then be set up which would submit to the Conference its findings and a plan on the procedure for further study and the handling of the problem.

The ICRC trusts that the present *Commentary* may prove helpful to all those attending the Diplomatic Conference and to some extent ease the difficult yet vital task that lies before them.