

**CONFERENCE OF GOVERNMENT EXPERTS ON
the Reaffirmation and Development of
International Humanitarian Law Applicable
in Armed Conflicts**

Geneva, 24 May - 12 June 1971

I

INTRODUCTION

**Submitted by the
International Committee of the Red Cross**



**Geneva
January 1971**

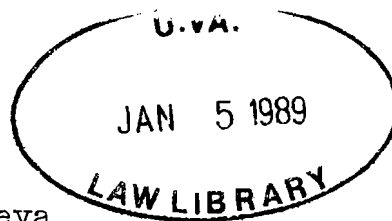
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Chapter I

GENERAL REMARKS

In annex to its letter of 22 October 1970, addressed to the Governments invited to take part in the Conference of Governmental Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the ICRC referred to the subjects it intended to submit to the Conference 1/ :

1. Measures intended to reinforce the implementation, in armed conflicts, of existing international humanitarian law;
2. Strengthening of the protection of civilian populations against dangers of hostilities;
3. Humanitarian rules relative to behaviour between combatants;
4. Protection of victims of non-international armed conflicts;
5. Status of combatants and the problem of guerrilla warfare;
6. Protection of the wounded and sick.

These subjects are treated in the eight documents which form part of the documentation prepared by the ICRC for the abovementioned conference 2/.

1/ See the list of these subjects appended (Annex I).

2/ See in annex the list and titles of these eight documents (Annex II).

Instead of presenting a single report covering all these subjects, the ICRC considered it preferable to submit a separate document on each of them. This solution was adopted especially for practical reasons, and will also facilitate study of the subjects if they are scattered among several commissions.

Each of these documents already contains an introduction covering the specific subject discussed. Nevertheless, the ICRC felt it necessary to have a general introduction to the documentation as a whole. Indeed, it is in the present document that the ICRC wishes to point out the principal reasons for this work and for this Conference, to describe the studies it has carried on since the XXIst International Conference of the Red Cross, and to indicate the basic ideas which have guided it in working out this documentation as well as the concrete proposals it contains. This introduction likewise makes it possible to give a general outline of the various installments, to point out the links existing among them, and to set forth the reasons which prompted it to select the subjects specifically submitted to the attention of the Conference.

It is not appropriate here to dwell at length on the underlying reasons for this work. Such reasons have been fully set forth in the reports that the ICRC presented to the XXIst International Conference of the Red Cross (Istanbul, 1969) 1/, and particularly in its Report on Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts 2/. First, we should simply recall that the ICRC, after having pointed to the existing disequilibrium between the matters governed by the Geneva Conventions, which are broadly developed and the field of rules for the conduct of hostilities, had stressed the need and urgency of placing its principal emphasis on the development of those parts of the law of armed conflict which appear to be the most insufficient, namely the rules relative to the conduct of hostilities, in the broadest sense, and the rules applicable in internal conflicts. "To reaffirm", as this report noted, since

1/ This Conference will frequently be referred to as "the Istanbul Conference".

2/ See this report, hereinafter called "Report of the ICRC on Reaffirmation", p. 4 - 16.

there are already certain rules, certain principles, often customary law, which are little known. "To develop", since the existing norms and principles should be specified concretized and completed in a series of rules often contained implicitly in these norms.

The Report also specified that, above all, it was a matter of developing rules of a distinctly humanitarian character : those concerning protection of the human person or of the property essential to him. Lastly, the Report referred to "laws and customs applicable in armed conflicts", to show that written rules as much as customary practice were being considered. In this respect, it will be noted that the ICRC has replaced this expression by the words "international humanitarian law applicable in armed conflicts" 1/.

With these reports before it, the Istanbul Conference adopted several resolutions, among them especially Resolution No XIII, which constitutes the principal basis for the present work and for the Conference of Governmental Experts convened by the ICRC for May 1971. This Resolution, the text of which is appended, contains, in particular, two essential elements :

- the Resolution, fully confirming the views of the ICRC, "underlines the necessity and urgency of reaffirming and developing humanitarian rules of international law applicable in armed conflicts of all kinds, in order to strengthen the affective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949";
- this Resolution, we should remember, outlines a specific programme for the latter study of the ICRC. In fact, the latter was requested "to pursue actively its efforts in this regard, with a view to :
 1. proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law,

1/ As to the meaning and the scope of this expression, see page 25.

2. inviting governmental, Red Cross and other experts, representing the principal legal and social systems in the world, to meet for consultations with the ICRC on these proposals,
3. submitting such proposals to Governments for their comments, and,
4. if it is deemed desirable, recommending that the appropriate authorities convene one or more diplomatic conferences of States Parties to the Geneva Conventions and other interested States, in order to elaborate international legal instruments incorporating those proposals".

Five other Resolutions of that same Conference charged the ICRC with special tasks which complete and strengthen the general mandate contained in Resolution No XIII.

1. Resolution XIV (Weapons of Mass Destruction)

In particular it requests the ICRC "to continue to devote great attention to this question, consistent with its work for the reaffirmation and development of humanitarian law and to take every step it deems possible".

2. Resolution XV (Status of Civil Defence Service Personnel)

It requests the ICRC "to continue its work in this field and to convene a meeting of governmental and Red Cross experts with a view to submitting to Governments, for approval, regulations supplementing the provisions of the existing humanitarian conventions, in particular the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949".

3. Resolution XVI (Protection of Civilian Medical and Nursing Personnel)

It requests the ICRC "to submit specific proposals to Governments along these lines with a view to the rapid conclusion of an additional protocol to the First and Fourth Geneva Conventions".

4. Resolution XVII (Protection of victims of non-international armed conflicts)

It asks the ICRC "to devote special attention to this problem within the framework of the more general studies it has started to develop humanitarian law, in particular with the co-operation of Government experts".

5. Resolution XVIII (Status of Combatants in Non-International Armed Conflicts)

It requests the ICRC "to make a thorough study of the legal status of such persons and take the action in this matter that it deems necessary".

It is appropriate here to underscore, as a very important aspect, that three of these Resolutions (XIII, XV, XVI) call upon the ICRC to prepare and to present to a conference of experts concrete proposals for rules. The Istanbul Conference, in this way, clearly indicated its intention of going beyond the stage of simple studies, and entering that of formulated drafts for regulations. This has been a basic idea guiding the ICRC in the preparation of the documentation now presented to the governmental experts, as will be seen in the following chapters 1/.

1/ See further on, chapter III, number 3.

Chapter II

Work undertaken by the ICRC
since the "Istanbul Conference"

1. Consultation of experts

As the foregoing chapters have shown, the "Istanbul Conference" entrusted the ICRC with a very far-reaching task for the development of international humanitarian law. In particular, it was asked to submit a programme of concrete proposals to a conference of governmental experts.

To be sure, in several of these fields, the ICRC had already assembled valuable documentation by its prior work and through its meetings of experts 1/. However, to take into account more diversified and more recent currents of thought, in addition to its practical experience, the ICRC decided that, in order to establish these concrete proposals, it should provide itself with the most qualified opinions and should consult, individually and on a private basis, some fifty authorities representing the chief regions of the world. Most of the consultations were in writing, or by means of conversations taking place in the consultant's country. A few were held at the ICRC headquarters.

This method, which is valuable in so many respects, necessarily required a greater expenditure of time than a simple meeting of experts in Geneva, for some of the prominent consulted were fully engaged in other occupations and could not reply within the time limits envisaged.

1/ Reaffirmation Report, pp. 26-28. Cf. also Commission of experts on the question of assistance to political detainees (1953), on the application of humanitarian principles in case of internal disturbances (1955), and on the aid to victims of internal conflicts (1962).

These consultations dealt with the tree following points :

a) Non-international conflicts and guerrilla warfare :

On the basis of a questionnaire (D 1141b) and a Commentary on that questionnaire (D 1142b), the ICRC consulted the following persons (listed alphabetically) :

- Dr. M. BELAOUANE, President of the Algerian Red Crescent, Algiers.
- Prof. I. BLISHCHENKO, Moscow.
- S. DABROWA, Legal Counsellor, Warsaw.
- Major T. DALE, President of the Norwegian Red Cross, Oslo.
- Colonel G.I.A.D. DRAPER, London.
- Prof. DUNCANSON, Canterbury, Great Britain.
- WORLD VETERANS FEDERATION (FMAC), Paris.
- H. FORD, President of the Red Cross of Panama, Panama.
- E. GARCIA-SAYAN, President of the Red Cross of Peru, Lima.
- Prof. G. HERZEGH, Budapest.
- Prof. F. KALSHOVEN, Leiden, Netherlands.
- Judge KEBA M'BAYE, Dakar.
- Colonel I. KRASNOPEEV, Leningrad.
- S.M.S. MacBRIDE, Secretary-General of the International Commission of Jurists, Dublin, Geneva.
- Maître Henri MEYROWITZ, Attorney, Paris.
- J. MURUMBI, Nairobi.
- Dr. C. ROSSELL, President of the Red Cross of Bolivia, La Paz.
- Prof. M. SAHOVIC, Belgrade.
- A. SCHLÖGEL, Secretary-General of the Red Cross of Germany in the German Federal Republic, Bonn.
- Colonel J.M. SIMPSON, Ottawa.
- Prof. Nagendra SINGH, New Delhi.
- P. VILLETORTE, Secretary-General of the International Federation of Police Officers, Paris.
- Colonel J.P. WOLFE, Ottawa.

The ICRC wishes to thank these experts whose opinions were most valuable to it in the formulation of its proposals 1/.

Furthermore, through its delegates, the ICRC was able to obtain, by means of its questionnaires, the points of view of authorities in several States presently engaged in conflict, who spoke informally and in their private capacities, and whom the ICRC likewise wishes to thank here. This procedure, in particular, enabled it to gather opinions in Algiers (representatives of movements struggling against the Portuguese Authorities in Western Africa), in Amman (representatives of Palestinian movements), in Lisbon, Cairo, Phnom-Penh and Tel-Aviv.

As part of its collaboration with the United Nations (cf. below), account must be taken of the working programme of the United Nations Secretariat and in particular of the Human Rights Division. The ICRC decided to grant a certain priority in time to its consultations concerning non-international conflicts and guerrilla warfare, so as to be equipped to prepare a preliminary report 2/, which it submitted to the Secretary-General of the United Nations early in August 1970. Several subsequent consultations could not be brought into that report and hence their influence was only reflected in Documents V and VI presented to the Conferences of Governmental Experts.

b) Protection of the civilian population against the dangers of hostilities

This problem which had been a matter of active concern for the ICRC for a long time also led to a series of consultations with a number of experts and other authorities, likewise conducted on a private and personal basis. They gave their opinions in response to a "Questionnaire on the Protection of the Civilian Population Against

1/ Cf. Document V, "Protection of Victims of Non-International Armed Conflicts", and Document VI, "Rules Applicable in Guerrilla Warfare".

2/ Preliminary Report on the consultations of experts concerning non-international conflicts and guerrilla warfare (D 1153b), Geneva, July 1970.

the Dangers of Hostilities" (D 1157b), Geneva, August 1970. The following is the alphabetical listing of experts consulted :

W. BARGATZKY, President of the German Red Cross in the Federal Republic of Germany, Bonn.

General A. BEAUFFRE, Paris.

Prof. I. BLISHCHENKO, Moscow.

Div. Colonel K. BRUNNER, Berne.

Major General Odd BULL, Oslo.

Prof. E. CASTREN, Helsinki.

Lt. General CHATTERJEE, New Delhi.

Colonel G.I.A.D. DRAPER, London.

Prof. F. FELICIANO, Manilla and New York.

Prof. L.S. GREEN, Canada.

Prof. F. KALSHOVEN, Leiden, The Netherlands.

Colonel I. KRASNOPEEV, Moscow.

Prof. W. LUDWIG, President of the German Red Cross in the Democratic Republic of Germany, Dresden.

His Excellency Minister E. MAKONNEN, Addis-Ababa,
Ethiopia.

Colonel T. MALIK, Warsaw.

R. NEIDL, of the Stockholm International Peace Institute,
Stockholm.

Lt. General van ROLLEGHEM, Brussels.

Prof. M. SAHOVIC, Belgrade.

Prof. Nagendra SINGH, New Delhi.

Prof. Y. TAKANO, Tokyo.

The results of these consultations were not contained in a separate report. They are to be found in Document III, "Protection of the Civilian Population Against the Dangers of Hostilities".

c) Protection of the wounded and sick

Without going into the century-long concern of the Red Cross, and in particular of the ICRC, in the interest of the wounded and the sick, nor the efforts undertaken since 1949 1/, it should be pointed out that the ICRC has undertaken three significant initiatives in this field since the XXIst International Conference of the Red Cross (Istanbul 1969) :

- FIRST, the dispatch, in February 1970, of a questionnaire on Resolution XVI of Istanbul (Protection of Civilian Medical and Nursing Personnel) to all the Governments of the States signatories of the Geneva Conventions. To date 71 Governments have replied to this questionnaire.
- SECOND, the ICRC held, in Geneva, three "Discussions on International Medical Law", (the XIIth in 1969, the XIII and XIVth in 1970), bringing together representatives of the World Medical Association, the International Committee of Military Medicine and Pharmacy, the International Committee of the Red Cross and, as observers, those of the World Health Organization, the League of Red Cross Societies, the International Law Association, the Medico-Legal Commission of Monaco and the International Committee for the Neutrality of Medicine.
- THIRD, the convening at Geneva of an experts' meeting devoted to the safety and identification of medical transports, held on 28 and 29 October 1970. The list of participants, as well as the results of their work, are given in Document VII, "Protection of the Wounded and Sick", pp. 39-40.

1/ Cf. on this matter, Document VII, "Protection of the Wounded and the Sick", Introduction, pp. 1-3.

2. Relations with the United Nations 1/

Let us point out initially the views of the Third Commission in its report to the 25th Session of the General Assembly :

- "9. All members of the Committee expressed satisfaction at the close consultation and the fruitful co-operation between the Secretary-General of the United Nations and the International Committee of the Red Cross in carrying out the activities which each side was mandated to pursue within the framework of the common international effort to enhance the protection of human rights in all armed conflicts through the more effective application of existing humanitarian rules or, where appropriate, the formulation of new ones. It was stressed that such harmonious contacts and relations should be maintained in the future. In this connexion, the members of the Committee paid tribute to the International Committee of the Red Cross for its important and pioneering role through the decades in the development and codification of the existing body of humanitarian law."

2/

At its 24th Session in 1969, the General Assembly placed on its agenda, as item 61, "Respect for Human Rights in Armed Conflicts : Report of the Secretary-General". The Secretary-General's Report (A/7720) officially noted the collaboration of the United Nations with the ICRC 3/ : at the Istanbul Conference, the Secretary-General was represented by the Director General of the United Nations Office in Geneva and by the Director of the Human Rights Division. Following that Conference, the President of the ICRC submitted two reports to the Secretary-General which had been

1/ For relations with the United Nations prior to Istanbul, Cf. Reaffirmation Report, especially pp. 13, 16-17, 19-21, 24-30, as well as part of B of the annexes of the same Report, "Resolutions Adopted Within the United Nations Organization".

2/ Respect for Human Rights in Armed Conflicts. Report of the Third Commission A/8178 (4 December 1970), p. 4. para. 9.

3/ A/7720 D, para. 11.

presented by the ICRC at Istanbul 1/, as well as Resolutions XIII to XVIII of Istanbul 2/.

The discussions of the General Assembly on this point were followed by Mr. Claude PILLOUD, Director of the ICRC, who had numerous contacts with Mr. Marc SCHREIBER, Director of the Human Rights Division, as well as with delegates concerned with this question. On 16 December 1969, the General Assembly, by a vote of 91 to 23, adopted Resolution 2597 (XXIV) concerning the respect for human rights in armed conflicts 3/ in which the General Assembly took note of the Resolution of Istanbul, called upon the Secretary-General to continue the study undertaken under Resolution 2444 (XXIII) 4/ and to "contact and to establish close co-operation with the International Committee of the Red Cross concerning the studies undertaken by that body on the subject" 5/.

The Secretary-General was invited, by the same Resolution, to submit a new report on the question to the 25th Session of the General Assembly. As has already been briefly indicated above, within the scope of its collaboration, ICRC was to give a certain priority in time to its consultations on the problems raised by the application of humanitarian law in non-international conflicts and guerrilla warfare, and to turn over to the Secretary-General, at the beginning of August 1970, a "Preliminary Report on the Consultation of Experts Concerning Non-International Conflicts and Guerrilla Warfare" (D 1153b), which the Secretary-General took extensively into account when preparing his second report

1/ 1) Reaffirmation and Development of Laws and Customs Applicable in Armed Conflicts;
2) Protection of Victims of Non-International Conflicts.

2/ Cf. texts of these Resolutions in Document VIII (Annexes), reproduced in the First Report of the Secretary-General (A/7720), pp. 103-106.

3/ Cf. full text of this Resolution in Document VIII.

4/ Cf. full text of this Resolution in Document VIII.

5/ A/Res. 2597 (XXIV), number 2.

on item 47 of the agenda, "Respect for Human Rights in Armed Conflicts", A/8052, 18 September 1970 1/. The ICRC was also to contribute to the efforts of the Secretary-General of the United Nations by delegating Mr. R.-J. WILHELM, Assistant Director at the ICRC, to an Experts' Meeting at the United Nations headquarters at New York 2/.

The discussions of the 25th Session concerning item 47 of the agenda were followed by Messrs Claude PILLOUD, ICRC Director, and André-Dominique MICHELI, ICRC delegate to the International Organizations. On 2 October Mr. Marcel A. NAVILLE, President of the ICRC, addressed a letter to U THANT, Secretary-General of the United Nations, in which he outlined the 1971 work programme of the ICRC in the field of international humanitarian law 3/ and, in particular, his intention to convene a conference of governmental experts.

The 25th General Assembly of the United Nations adopted several resolutions on humanitarian law, the texts of which are appended hereto 4/. One of these

-
- 1/ Report of the Secretary-General A/8052, passim. The "Preliminary Report" is explicitly cited in para. 165.
- 2/ Cf. Report of the Secretary-General A/8052, para.8, note 7.
- 3/ The text of this letter, a copy of which was sent for their information, to the Permanent Missions in New York, was reproduced in "The ICRC in Action, Information Notes", No. 151, 6 November 1970, pp. 12 - 13.
- 4/ Cf. in particular, the following Resolutions, adopted by the General Assembly, upon recommendation of the Third Commission :
- A/Res. 2673 (XXV), "Protection of Journalists engaged on Dangerous Mission in Areas of Armed Conflict".
 - A/Res. 2674 (XXV), "Respect for Human Rights in Armed Conflicts".
 - A/Res. 2675 (XXV), "Basic Principles for the Protection of Civilian Populations in Armed Conflicts".
 - A/Res. 2676 (XXV), "Respect for Human Rights in Armed Conflicts".
 - A/Res. 2677 (XXV). "Respect for Human Rights in Armed Conflicts".

The full texts of these Resolutions are given in Document VIII.

resolutions 1/ emphasizes "the importance of continued close collaboration between the United Nations and the International Committee of the Red Cross". It calls upon the Secretary-General to "transmit his report and the comments of the Governments thereon, together with the records of relevant discussions and resolutions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, to the International Committee of the Red Cross for consideration, as appropriate, by the Conference of Government Experts," and "to present the comments received to the General Assembly at its twenty-sixth Session and to report at that Session on the results of the Conference of Government Experts to be convened by the International Committee of the Red Cross and on any other relevant developments."

3. Relations with non-governmental organizations

Let us first mention, in chronological order, the following conferences and meetings in which the ICRC has taken part 2/ :

- European Centre of the Carnegie Foundation, Geneva :
Colloquy on the law of armed conflicts, current problems, 15-20 September 1969.
- Institute of International Law :
Edinburgh Session, September 1969.
- Women's International League for Peace and Freedom (WILPF) :
Conference on biological and chemical warfare, London, 21-23 November 1969.
- Free University of Brussels, Centre of International Law (Institute of Sociology) : Conference, "Humanitarian Law and Armed Conflicts", Brussels, 28-30 January 1970.

1/ A/Res. 2677 (XXV), Resolution adopted 111 votes for, 0 against, 4 abstentions.

2/ A list of these meetings, with mention of the principal reports, summaries, and Resolutions will be found in Document VIII, "Annexes".

- International Society of Military Penal Law and the Law of War :
Fifth International Congress, Dublin, 25-30 May 1970.
- International Institute of Humanitarian Law, San Remo
"Human Rights as the Basis of International Humanitarian Law", 25-27 September 1970.

The ICRC should also express its gratification at the excellent collaboration for reaffirmation and development of humanitarian law established with a certain number of non-governmental organizations.

Furthermore, Resolution XIII of Istanbul encouraged it, in addition to collaborating with the United Nations, to collaborate with "all other official and private organizations with a view to ensuring the co-ordination of such studies".

In addition, regular contacts have been established or continued, outside of the above-mentioned meetings, with numerous other non-governmental organizations.

Lastly, the ICRC has regularly attended, as an observer, the meetings of the Committee of the NGO's on disarmament as well as the Committee of the NGO's on human rights; it was likewise represented by the League of Red Cross Societies on the Committee of NGO's on development. Furthermore, certain associations and organizations having a special interest in international humanitarian law will be invited to send representatives to a meeting to be held in 1971 at a date not yet decided.

4. Relations with Red Cross National Societies

Last but not least, the ICRC cannot fail to emphasize the valuable assistance afforded to it by the National Societies of the Red Cross, the Red Crescent and the Red Lion and Sun, and, in addition, by the League of National Societies of the Red Cross.

Whether it was at the Istanbul Conference, in the organization of the "Day of the 8th of May" (the theme of which, in 1970, was "Protect Man - Thwart War"), in consultations of experts (often organized or assisted by the National Societies), or in regular contacts, the ICRC begs all involved to find here the expression of its heartfelt thanks for the significant contributions they have provided for the reaffirmation and development of international humanitarian law.

To unite the Red Cross world even more closely in this undertaking, the ICRC announced to the National Societies, in its 478th Circular 1/, a meeting in which the Societies could exchange points of view amongst themselves and with the ICRC on international humanitarian law. Considering the many favorable responses, the ICRC, in its 481st Circular 2/ invited all the National Societies if they wished, to take part in a "Conference of Experts of the Red Cross for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts", at The Hague, from 1 to 6 March 1971. The ICRC also wishes to thank the Netherlands Red Cross, as well as all the National Societies which accepted the invitation to take part in this meeting, the report of which will be transmitted to the Conference of Government Experts 3/ .

1/ 478th Circular : Development of International Humanitarian Law. Geneva, 15 April 1970. Cf. text in Doc. VIII.

2/ 481st Circular : Conference of Red Cross Experts for the Reaffirmation and Development of Law Applicable in Armed Conflicts. Geneva, 28 October 1970. Cf. text in Document VIII.

3/ We may recall that this procedure had already been adopted for the conventions of 1949, for which a "Preliminary Conference of the National Societies of the Red Cross for the Study of the Conventions and the Various Problems Concerning the Red Cross", was held in Geneva, 26 July to 3 August 1946, while the "Conference of Government Experts for the Study of the Conventions Protecting the Victims of War" also met in Geneva from 14 to 26 April 1947.

Chapter III

Scope of subjects submitted to the Conference of
Governmental Experts and presentation of the
documentation prepared for this purpose

Resolution XIII of the Istanbul Conference, referred to above, called upon the ICRC to continue its studies on the basis of its report so as to present concrete rules to the governmental experts. Furthermore, as has been seen, other Resolutions of that Conference assigned it the task of developing concrete proposals in certain particular fields. These constituted the chief guidelines for the ICRC in the choice of subjects submitted to the governmental experts and in the elaboration of the documentation prepared for that purpose.

Nevertheless, as compared with the documents it submitted to the Istanbul Conference, the ICRC was led to give particular emphasis to certain subjects and to accord less importance to others.

Thus, the ICRC has given greater importance to two fields : measures intended to reinforce the implementation of the existing law, and the protection of the wounded and sick.

a) In its documentation for the Istanbul Conference, and in particular in its Report on Reaffirmation, the ICRC envisaged measures intended to reinforce the application of the law especially in relation to the rules which were to be reaffirmed or developed. In the consultations with experts which it undertook last year, as also in the discussions which took place in the 3d Commission of the

United Nations, it was emphasized on many occasions that the efforts intended to develop the law of armed conflicts should not in any case detract from or diminish the efforts that should be maintained to achieve the regular application of existing humanitarian law and, in particular, the Geneva Conventions. This conception is completely in accord with that of the ICRC, which had, moreover, made clear in its Report on Reaffirmation that the regular observation of existing law continued to be one of its chief concerns.

In order to take this perspective into account, the ICRC considered it timely to place, among the subjects submitted to the governmental experts' meeting - and even heading the list of such subjects - the problem or measures calculated to reinforce the application of existing humanitarian law. One special instalment of this documentation is devoted to this problem (Document No II). It goes without saying that the measures envisaged in this documentation, whether they be specifically of a legal nature (control, penalties, reprisals) or whether they be of a practical nature (increased circulation of the texts of law), should likewise be valid for the new rules to be established.

In addition, as the ICRC has frequently pointed out, the vagueness or insufficiency of rules in certain areas of the law of armed conflicts indirectly compromises the systematic observation of existing law. In this way the efforts intended to develop the law of armed conflicts must, in the last analysis, be considered as a concern directly linked to that of obtaining regular observation of the Geneva Conventions and the other existing rules of humanitarian law.

b) The protection of the wounded and the sick (which is the subject of document VII) is another field in which the ICRC deemed it necessary to develop the law in a particular direction 1/. In addition to its proposals for the protection of civilian medical and nursing personnel in international conflicts, consistent with Istanbul Resolution XVI, the ICRC deemed it essential to draw up rules for the

1/ In this respect, it submitted to further study the elements of a set of draft rules which it had put forward at the International Conference of the Red Cross in 1965.

protection of that personnel and of the wounded and the sick in internal conflicts, since in that respect the failure to develop Article 3 had been keenly felt. In addition, in a like mind, it considered it necessary to put forward proposals to improve the rules in the Fourth Geneva Convention intended to protect the wounded and the sick. The proposals it drafted are followed by a description of the results of its recent work on the safety of medical transports.

On the contrary as compared to the documents which it submitted to the Istanbul Conference, the ICRC did not push its studies further on the following points :

- a. prohibition of 'blind' weapons or those causing unnecessary suffering

This question is taken up in connection with the protection of civilian populations (see Document III, Title III, Chapter 3) and in connection with guerrilla warfare (see Document VI, Part. IV, 6). However, it does not constitute, in itself, one of the matters explicitly submitted to the Conference of Governmental Experts nor does it constitute the subject of a separate document. It goes without saying that this is no way signifies that the ICRC does not give this question all the importance it merits, because it is the first recognize that the protection of victims in armed conflicts depends to a large extent on the weapons employed. Its reservation on this point, in its documentation and in the list of subjects submitted to the Conference of Experts, is based rather on reasons of procedure and of competence.

Indeed, when it comes to weapons of mass destruction (including nuclear weapons) or biological and chemical weapons, their prohibition or limitation has been a subject of discussion for a long time within the appropriate bodies of the United Nations or of the Disarmament Conference. As this subject is being discussed thoroughly within these bodies, these latter appear to be competent in the first instance to deal with it, and hence there is no reason to submit it to the Government Experts convened by the ICRC.

This is why Resolution XIV of the Istanbul Conference (Weapons of Mass Destruction) first asks the United Nations to pursue its efforts in this field and then requests the ICRC to "continue to devote great attention to this question, consistent with its work for the reaffirmation and development of humanitarian law and to take every step it deems possible." As will be seen by its documentation on protection of civilian population or on guerrilla warfare, the ICRC has not failed to devote the necessary attention to the question, and if it appears that no definitive and satisfactory solution thereof can be found in the aforementioned bodies, it will then be ready to offer its assistance in contributing to a solution. Furthermore, as pointed out in its documentation for the Istanbul Conference, the ICRC, as well as the Red Cross as a whole, expects to continue its efforts and its appeals at the moral level, in order that the Governments may refrain from having recourse to such weapons and may, with all possible speed, reach an understanding on the means for their prohibition.

In addition, together with weapons of mass destruction, other weapons give concern to the ICRC because of their indiscriminate nature or because of the unnecessary suffering they can cause. In this regard, reference is made not only to incendiary weapons, to napalm in particular (which, moreover, is sometimes classified among chemical weapons), but also to certain anti-personnel weapons which have been developed during recent conflicts. The document on guerrilla warfare, in particular, takes note of this. In this field also, the opinion of the ICRC is that the prohibition of such weapons, in themselves, falls principally within the competence of the United Nations. It is proper for the Red Cross, and of the ICRC in particular, to consider weapons more from the point of view of their employment, when they wrongfully injure those persons whom the Geneva Conventions seek to protect, or when they cause unnecessary suffering.

Animated by such consideration, the Red Cross and the ICRC greeted, with much interest, the suggestion made in the Report of the Secretary-General 1/ to assign the study of the effects of napalm to a group of experts.

1/ Report of the Secretary-General on Respect of Human Rights in Armed Conflicts, A/8052, paras 125, 126.

However, if it should appear that weapons in this category are not to be studied either within the United Nations or by the Disarmament Conference, the ICRC would be quite prepared, if the experts so recommended, to reconsider its position and to take the initiative itself of making specific studies of certain weapons of an indiscriminate nature or likely to cause unnecessary suffering.

b. The application of humanitarian law by the United Nations Forces was also treated in a section of the ICRC Reaffirmation Report for the Istanbul Conference. Here the ICRC raised the question of the protection of victims in non-international conflicts in connection with a particular point. 1/ However, since Istanbul, it has not devoted special study to the general problem of application of humanitarian law by the United Nations forces; nor does this point appear distinctly in the list of subjects submitted to the governmental experts.

In fact, the ICRC considers, on the one hand, that this would be a valuable field of study for the United Nations as such, as a logical consequence of the stipulations of the Charter which make it possible for the Security Council to have recourse to measures of force utilizing armed contingents. 2/

In any event, the ICRC cannot but confirm the conclusions it reached in its Report for Istanbul and hopes that the United Nations will, in one way or another, announce its adhesion to the Geneva Conventions.

1/ See Document V, p. 22.

2/ It may be added that the question is at present being studied in a thorough manner by Commission I of the Institute of International Law, under the title, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies" (Conditions for Applying the Law of War to Military Operations of the United Nations). An extended report devoted to this question (Preliminary Report and Final Report presented by Prof. Paul de Visscher) will be discussed in this connection during a session of the Commission to be held in the Spring of 1971 in Yugoslavia. The conclusions reached by the Institute on this subject will certainly constitute a valuable contribution for any subsequent study in this field.

c. Nor has the question of aggression and of the equality of the Parties, which was also dealt with by the ICRC in its Report for Istanbul, been made the subject of a particular study. On this point, the ICRC abides by the conclusions given in the following chapter devoted to the fundamental ideas which have guided the elaboration of the documentation.

d. Finally, the procedure to be followed to continue these studies and to arrive at valid instruments of international law, a question dealt with in one chapter of the ICRC Report for Istanbul on Reaffirmation, has not been made the subject of a special document and does not figure explicitly in the list of subjects submitted to the Conference of Experts. However, the ICRC in no way seeks to exclude an exchange of opinion on this matter, to which, moreover, it devoted the final chapter of this introduction.

* * *

Presentation of the documentation

1. Unity of the subject matter

An armed conflict of a certain importance raises problems of humanitarian law, which involve at one and the same time, civilian populations, combatants, the wounded and sick, and also the procedures likely to facilitate the application of the law. Consequently, any division of the material into several documents carries with it certain disadvantages and is somewhat arbitrary. The ICRC has endeavoured to remedy this by inserting, in each document, references to the parts of the other pertinent documents.

Furthermore, in so far as possible, in Document No II ("Measures Intended to Reinforce the Implementation of Existing Law") it has dealt with general problems such as those of supervision, of reprisals or sanctions, which are, however, sometimes mentioned in the separate documents when this was justified for particular reasons - such as the problem of supervision in non-international conflicts.

In the study of this documentation, we should therefore keep clearly in mind the close links existing among the various subjects and the various documents. Doubtless this will also require the establishment of a close liaison in the work of the Conference, if this is divided among several commissions.

While the unity of the law of armed conflicts should be emphasized in this way, it should also be pointed out that, in these studies and proposals, the ICRC has again taken full account of the fundamental distinction existing in the Geneva Conventions between international conflict and non-international armed conflict. However blurred this distinction may be in certain types of conflicts, it remains, nevertheless, one of the bases of the present law of armed conflict.

2. Taking the work of the United Nations into consideration

The preceding chapter of this document has indicated the close relations which the ICRC has maintained with the organization, in conformity to the Resolutions of the International Red Cross and also to those adopted by the General Assembly of the United Nations. Thus it has endeavoured to take into account the discussions and results of the most recent General Assembly of the United Nations on the question of respect for human rights in armed conflicts. To do so - especially as these resolutions adopted on this matter were not finalized until mid-December - the ICRC had inevitably to postpone giving final form to its documentation and, in particular, to its proposals. However, it felt that certain texts and proposals, drawn up in the light of more recent developments, would be considered as more helpful for discussion at the experts' meeting, even if a certain delay was involved.

3. Presentation of concrete proposals

As Resolution XIII of Istanbul requested, the ICRC has endeavoured to go beyond the stage of simple studies or suggestions and to arrive at concrete proposals of rules intended progressively to complete the law of armed conflicts.

Depending on the subject matter, these proposals are more or less fully elaborated. Sometimes they are entirely worded drafts of articles, sometimes simply substantive proposals, sometimes even indications of the direction to be taken, or even questions put to the experts.

In this way the documentation as a whole contains four draft Protocols, more or less elaborated : one draft additional Protocol to the Geneva Conventions for the protection of wounded and sick and medical personnel; the elements of one additional Protocol to Article 3 relative to non-international armed conflicts, of one Protocol relative to the protection of civilian population in time of armed conflict, and of one Protocol interpreting Article 4 of the IIIrd Geneva Convention (conditions to be satisfied to obtain the status of prisoners of war). The documentation, furthermore, includes the elements of a draft of declaration concerning the protection of victims in case of internal disturbances and a draft of model rules covering guerrilla warfare.

The ICRC wishes to make it clear that these concrete proposals should not, for the most part, be considered as doctrinal positions of the ICRC itself, but as working tools elaborated as part of its role as a body called upon to work toward the development of international humanitarian law. They are intended to facilitate the work of the governmental experts and aid them in arriving at a decision - since the aim of the Conference is essentially to enable the ICRC subsequently to submit well thought out proposals to all of the Governments, as Resolution No. XIII of the "Istanbul Conference" requests it to do. These proposals reflect the present line of its thinking on the subject matters in question, but the ICRC is the first to be aware of their complexity and difficulty. Thus it is prepared, in the light of the development of this undertaking, to reconsider one or another of these positions or these proposals in order to obtain more easily solutions likely to be accepted unanimously.

4. Texts appended

For practical reasons, the ICRC considered it expedient to have texts of laws and resolutions relating to the subject matter figure in annexes to each document, which

will spare the experts and readers from having, at times, to undertake long and difficult reasearch. Furthermore, texts of international Conventions and resolutions of a general scope which concern the whole of the documentation, are given in Document No VIII, entitled "Annexes", which also contains detailed information on the various meetings of an international nature which have been held since the Istanbul Conference, and which have dealt with various aspects of the law of armed conflict.

5. Significance and scope of the expression "international humanitarian law applicable in armed conflicts"

As stated in Chapter I, 1/, the words "laws and customs applicable in armed conflicts" in the Report on Reaffirmation which the ICRC submitted to the Istanbul Conference, have been replaced in current documentary material by the more usual expression "international humanitarian law applicable in armed conflicts". By that is meant, as also mentioned earlier, those rules of the law of armed conflict which are clearly humanitarian in nature, namely those which protect human beings and the property essential to them. Consequently, the term covers not only the Geneva Conventions but also treaty or customary law rules which, for humanitarian reasons, lay down limits to be observed in the conduct of hostilities, the use of weapons, the behaviour of combatants and recourse to reprisals, as well as norms intended to ensure the proper application of those rules (e.g. supervision and penal sanctions).

In its Report on Reaffirmation 2/ the ICRC singled out the matters which could be considered as not being covered by the expression mentioned above, particularly the rules relating to the outbreak or termination of hostilities, the non-hostile relations between belligerents, the disposal of enemy property, sea warfare, the hostilities between air forces and all the law of neutrality 3/. These matters, on the other hand, are included in "the law of

1/ See page 3.

2/ See pages 31 - 35 the ICRC's Report on Reaffirmation.

3/ That some of these rules may be humanitarian in nature is, as some experts pointed out, not to be ignored.

armed conflicts" or "the law of war" which are therefore of wider scope than that expression.

In the present document, as in the others, the expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or even "humanitarian law" 1/.

These abbreviations, incidentally, may give rise to confusion which must be dispelled. Indeed, the terms "international humanitarian law" or "humanitarian law" are sometimes given a wider meaning 2/ covering all international law rules which are intended to ensure in all circumstances respect for and development of the human personality. This wider meaning also covers international instruments (Declarations and Conventions) relative to human rights and of which there have been about thirty drawn up within the framework of the United Nations, the most important being the International Covenants on economic, social, cultural, civil and political rights adopted in 1966. It is therefore NOT in this very broad sense that we must understand "humanitarian law" or "international humanitarian law" as used in the current documentary material. For that reason, in this document as in the others, when reference is made to instruments relating to human rights they are specifically mentioned.

It must also be realized that the term "international humanitarian law" in the sense used in the current documentary material, does not have an identical content for every State. Not only is it the scope of the obligations laid down in the Geneva Conventions which may vary in terms of the reservations which some States have made; other humanitarian rules of the law of armed conflict do not meet with unanimous agreement concerning their validity or scope. For example, some governments consider that the Geneva Protocol forbids the use in war of all gases without exception, whereas others exclude from that prohibition the gases said to be non-toxic.

1/ These abbreviations may be found also in the Istanbul Conference Resolutions XIII - XVIII.

2/ E.g., Jean PICTET : "Principles of International Humanitarian Law", p. 10.

Chapter IV

Guiding ideas determining the
elaboration of the documentation

Here is worth specifying the basic ideas which guided the ICRC in the preparation of its proposals submitted to the experts in relation to certain fundamental problems or certain questions of principle :

1) Perspectives of armed conflicts of the current type

Prior work of the ICRC for the development of humanitarian law, especially with reference to the protection of civilian populations, has often come up against a fundamental objection, that of "total war". In particular, in connection with its Draft Rules of 1956, it was pointed out that in case of generalized war, which some consider might be marked by recourse to nuclear arms, all limitations of a humanitarian nature would be vain. This type of argument, this scepticism, has certainly blocked the more rapid adoption of rules that are, nevertheless, quite necessary.

As it brought out in its Reaffirmation Report for the Istanbul Conference, the ICRC in no way intends to minimize the threat which unfortunately subsists of having such a broad conflict break out. And, as it has stated elsewhere, the Red Cross must continue to exercise its pressure at the moral level to see to it that no resort is ever made to weapons of mass destruction and nuclear weapons.

However, as it also stated in its Report for Istanbul, it feels it necessary to reaffirm and develop the rules intended to protect the human person in conflicts as they appear nowadays. The documentation and the concrete proposals submitted to the experts are placed in this context.

In this connection, reference is often made to "limited" or "localized" conflicts. But even if the hostilities are localized, the sufferings to be relieved are none the less intense. Therefore it would be preferable to say that the ICRC adopts the perspective of armed conflicts in which the rules and limitations it proposes are effectively applicable. And all conflicts subsequent to those of 1945, whatever be the means and the weapons employed, present this characteristic- as, indeed, those prior that period also did.

The experts it consulted have pointed out that while such a threat of a generalized conflict subsists, it seems less acute at present, thanks in particular to the efforts put forth by the Great Powers in respect to disarmament and to the limitation of strategic weapons, or even to a sort of tacit understanding. The objection formerly made to the work of the ICRC which we mentioned above should no longer, in their opinion, constitute a curb on this work.

On the contrary, as all experts pointed out, the multiplication of "localized" conflicts since 1945 has induced a sort of general recognition of the value of reaffirming rules applicable in these types of conflicts. Moreover, this recognition has been officially reflected in certain unanimously adopted resolutions of the United Nations. In particular, this is the case of the resolutions proposing principles for the protection of civilian populations, Nos. 2444 and 2675, which are examined in detail in Document No. III. When these resolutions were being discussed or adopted, no reservations were raised as to the inapplicability in certain types of conflicts of the principles of protection which they reaffirmed.

2) Relationship between the documentation and the instruments concerning human rights

As was shown in Chapter II, the ICRC has maintained close relations with the United Nations and the Secretary-General in regard to the studies made by the Organization concerning respect for human rights in armed conflicts. It was particularly interested in becoming acquainted with the extensive comparative study contained in the second report of the Secretary-General on relations between the humanitarian conventions and instruments concerning human rights 1/.

1/ Report of the Secretary-General, A/8052, Annex I

On several occasions, the ICRC documentation refers to these instruments and to specific human rights. Nevertheless, apart from certain cases which are examined later, in particular that of internal disturbances, the concrete proposals of the ICRC generally do not mention, nor do they systematically examine, their relations with these instruments.

This attitude in no way means that the ICRC is not fully aware of the importance of these instruments and particularly of the International Covenant on Civil and Political Rights. It is the first to hope that this instrument will quickly be ratified so that it may enter into force. Nor does the ICRC forget the regional conventions on human rights, in particular the European Convention, which has already afforded proof of its value.

This attitude is rather to be explained by its conception of the relationship between humanitarian law and the instruments mentioned above, and by its wish to avoid confusion, which is too frequently engendered in this respect. To clarify this conception, the best would be to quote an extract of the remarks made by one Government concerning the first report of the Secretary-General of the United Nations on respect for human rights in armed conflicts.

"It is important during all stages of the discussion of this matter to recognize that the general principles of the fundamental human rights, as they are laid down in the Universal Declaration, in the two Covenants, in other international instruments and in national legislation, apply fully in armed conflicts. This recognition has formed the basis for the development of the laws and customs of war, and of the humanitarian conventions that offer further protection for identified groups of persons in certain conflict situations" 1/.

1/ Document A/7720, November 20, 1969, page 81.

Actually, the concern for the fundamental rights for the human person is at the origin both of the humanitarian law applicable in armed conflicts and also of the Covenants relative to human rights. But international humanitarian law, and in particular the Geneva Conventions, achieve this goal by taking into account the specific nature and the highly particular characteristics presented by situations of armed conflict. To be sure, the instruments relative to human rights have a general scope and they likewise provide, as regards their basic norms, for their application "in time of public emergency which threatens the life of nation" 1/ or even, in the case of the European Convention, in situations of war. Nevertheless, it may be recognized that these instruments were not conceived chiefly with a view to situations of armed conflicts.

In contrast, to ensure genuine protection to the human person and to his fundamental rights, international humanitarian law devotes special attention to the characteristics of the armed conflict and to the fact that, in these situations, the normal conditions of life in the nation are completely modified. Consequently, it goes without saying that all reinforcement and all development of this humanitarian law contribute to the protection of the fundamental rights of the human person, and do so without any need to make special references to the instruments concerning human rights.

Many examples could be given of the need to provide, for armed conflicts, rules which extend beyond, detail, or develop certain of the rules set forth in the Covenants on human rights.

We shall limit ourselves here to mentioning only a few of them. For example, the provisions of the Geneva Conventions protecting prisoners of war when questioned by the enemy, or forbidding the latter to hold them in dangerous zones, may be attached to the general rule formulated in Article 7 of the Covenant on Civil and Political Rights forbidding cruel or inhumane treatment. But this rule, by itself, is far from sufficient to cover the particular conditions which are faced by prisoners of war and to provide

1/ Article 4 of the International Covenant on Civil and Political Rights.

them with guarantees adequate to such conditions. Another example is the protection of the vital right of civilian or military prisoners to correspond with their families and to contact the ICRC Central Research Agency. This could possibly be placed under Article 19 of the Covenant Concerning Freedom of Expression, but, in addition to the fact that such a link is rather tenuous, this Article is precisely one of those from which derogation can be made in emergencies.

The foregoing considerations apply even more to the rules of humanitarian law settling limits to the conduct of hostilities. The prohibition against attacking civilian populations as such or exposing them to the dangers of attack, the need to take precautions in bombarding military objectives, all these rules, developed in this way in the document III, might quite as well appear as application of the above mentioned Article 7 of the Covenant, but in order to assure effective protection of the civilian population and of its fundamental rights in case of armed hostilities, it is these very rules which are necessary, and not only Article 7.

Furthermore, international humanitarian law applicable in armed conflicts - a side of the problem left untouched by the instruments concerning human rights - contains a series of rules specifying intended to facilitate the assistance which must be given to the human person in situations of armed conflict. In this respect we need only think of all the stipulations concerning the relief which can be brought to the victims, of the particular protection of medical and nursing personnel, of the existence of a special emblem to protect this relief personnel.

Lastly, in the very organization of procedures intended to secure the regular application of the law, it may be recognized how much more appropriate is the mechanism provided by the humanitarian Conventions in special situations of armed conflict as contrasted to the complex and necessarily slow procedure provided by Articles 40 to 45 of the Covenant on Civil and Political Rights. Thus war prisoners, like civil internees, will have the right of direct access to the Protecting Powers, and the latter will be able to visit all the places where they are interned.

It is true that the foregoing considerations are chiefly valid for international conflicts. In the case of internal conflict, it has been correctly noted that the rights provided by the aforementioned Covenant, at least those admitting of no derogation, afforded, on the whole,

just as many guarantees as those provided by Article 3 of the Geneva Conventions, (although it may be added the Covenants have nothing to say on the fundamental obligation of bringing relief to the wounded and sick.) The guarantees of Article 3 are, in fact, more and more considered as a minimum, valid in all circumstances. That is why the ICRC proposes to develop rules for the protection of the individual in typical non-international conflicts, which are better adapted by their very nature to such situations than are the general norms in the Covenants on human rights.

On the other hand, when conflicts of this nature are not involved, but rather situations of lesser scope which do not jeopardize the structures of the State, such as internal disturbances or tensions, the stipulations in the instruments concerning human rights will then take on their full importance and their broadest scope. For that reason, in its concrete proposals concerning internal disturbances and tensions, the ICRC refers directly to these instruments, among other texts.

3) Relationship between the documentation and The Hague Conventions

Certain of the matters submitted to the experts for examination are the subject of precise stipulations in The Hague Conventions of 1907, more exactly in the Regulations annexed to the Fourth of these Conventions. First, this deals with rules examined in Document No IV relative to the behaviour of combatants and, second, with certain stipulations relative to bombardments, examined in Document III on protection of the civilian population.

Taking into consideration these stipulations with a view to possible reaffirmation or development, the ICRC not consider them as conventional provisions tied to an instrument, the application of which depends on very strict, formal conditions (existence of war in the formal sense and clausula si omnes). Rather, as is generally agreed, it considers them as rules of customary law of a definitely humanitarian nature, in that they directly concern protection of the human person and that they are binding on all belligerents in case of international armed conflict. Some of them even, such as the fundamental rule relative to the limitation of the choice of means of injuring the enemy, was considered by Resolution No 2444 (XXIII) adopted by the UN General Assembly, as being applicable to every kind of armed conflict.

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Consequently, in asking that such rules be reaffirmed or developed, the ICRC does not thereby intend to take a stand in favour of possible revision of The Hague Conventions, in particular of the IVth - or at least, of the parts of the Regulations annexed to the latter which have not already been taken over and developed in the Geneva Conventions. It is likewise for this reason, although not excluding such a revision, that it has hitherto avoided taking a position on the question of ascertaining what instrument of international law could provide the point of attachment for the Protocol it proposes on the protection of civilian populations or the regulation concerning the behaviour of combatants.

As concerns this Protocol, certain experts consulted by the ICRC felt that such an instrument should normally complete Part II of the Fourth Geneva Convention. Likewise some felt that the rules concerning the behaviour of combatants could result in a Protocol supplementary to the Geneva Conventions, especially to the Third 1/; they believed that several of these rules, in the last analysis, condition the application of the Geneva Conventions on prisoners of war (for example the prohibition against declaring that no quarter will be given).

In contrast, other experts felt that the Geneva Conventions were specifically devoted to the treatment of persons in the power of the enemy or to the plight of the wounded and sick, and hence that the rules of the sort examined above, which chiefly concern the conduct of hostilities and the limitations which they must accept, should be the subject of a distinct instrument, separate from the Geneva Conventions.

Certain experts also pointed out that a revision of The Hague Conventions of 1907 as a whole, or even of the IVth alone, would raise highly complex problems : some of their provisions and even of their conceptions no longer seemed to be in harmony with the system and the organization of the international community established by the Charter of the United Nations, which forbids recourse to force, whereas these Conventions were set up at a period when such

1/ Idea formulated in the Second Report of the Secretary-General, A/8052, para. 113.

recourse was considered to be a lawful means of implementing the policy of States. It has likewise been pointed out that while the new States of the international community made regular efforts, by official declarations, to manifest their intention of being bound by the Geneva Conventions, no such situation existed in relation to the aforementioned Hague Conventions. This, despite the fact that in its most recent general resolution on respect for human rights in armed conflicts, the General Assembly invited those States which had not yet done so to adhere also to The Hague Conventions of 1899 and 1907 (see Resolution 2677 (XXV) number 1).

As stated with respect to the rules of the Protocol on the protection of civilian populations and the rules concerning the behaviour of combatants, the ICRC wishes to leave open the question of attachment. Doubtless, the governmental experts will also have the occasion to express themselves on this point, looking toward the definitive solution which may be achieved at a later stage. On the other hand, the ICRC considers it indispensable that these rules, even if some of them are considered to be customary law, should appear in their present form or in a developed form in some new instrument of international law, to which all the new States will be able to adhere expressly. Thus we will dissipate the uncertainty sometimes found as to the existence or non-existence of rules of customary law binding on the international community as a whole.

4) Equality in application of the rules of humanitarian law to the Parties to an armed conflict

In its Reaffirmation Report for the Istanbul Conference, the ICRC studied the thesis - which paralleled the increasing growth of the international Society - according to which the State which is victims of an aggression is not entirely required to apply the laws of war to the same extent as the author of the aggression. At the end of this study and in keeping with the authorized opinions it elicited, the ICRC considered that it would be proper, on this point, to support fully the opinion set forth, among others, in a resolution adopted by the Institute of International Law (Brussels, 1963) and, according to which, "the obligations whose purpose is to restrain the horrors of war and which are imposed on belligerents for humanitarian reasons by Conventions in force, by general principles of law or by the rules of customary law, are always in force for the Parties in all categories of armed conflict, and

apply equally to actions undertaken by the United Nations" 1/.

The studies it has carried on since the Istanbul Conference, and all the elements it was able to gather on that occasion, as well as its own practical experience, have only reinforced the ICRC in this opinion. This is therefore the guiding spirit animating all the rules of humanitarian law which it proposes in its documentation to reaffirm or develop for application in armed conflicts.

It is worthwhile to clarify one point here. The view expressed above in no way signifies that the ICRC intends to take a stand on the opinion shared by some authors and by the Institute of International Law itself, according to which, in case of a characteristic and recognized aggression, derogations in favour of the victim State, or of a third State, are authorized in certain fields of the law of war or of international relations. The defenders of this thesis have particularly in mind the rules concerning economic war, the law applicable after the end of hostilities, especially in relation to enemy property, as well as the law of neutrality. These are fields of law which quite specifically do not enter into the concerns of the ICRC nor touch on the subject matters submitted to the Conference of Experts, and, consequently, as it has already said, the ICRC does not intend to take a stand on that aspect of inequality in the application of law, a complex aspect which still remains to be clarified.

On the other hand, when it comes to rules of a humanitarian character which are imposed on the belligerents during hostilities - and these are precisely the rules examined and proposed in the ICRC documentation - the ICRC considers it essential that they should apply equally to the Parties to the conflict. To accept anything less would mean profoundly compromising the very application of humanitarian law as a whole, and consequently the protection of the victims, as well as of the fundamental rights of the human person. This would mean omitting consideration of the harsh realities encountered so long as hostilities continue.

1/ See Institute of International Law, Brussels Session, September 1963, Resolutions adopted by the Institute.

Even if success could be achieved in defining the notion of aggression, or even if an authorized agency of the international community recognizes such an act - which has rarely been the case up to now - the natural tendency of each of the Parties to a conflict is to consider that it is itself the victim of an aggression, or of a threat of aggression, and that, consequently, the struggle that it carries on is just. However, it cannot be agreed that such Party could arrogate the right, for example, to bombard indiscriminately the population of the enemy, or to refuse to spare the life of an enemy soldier who surrenders. Otherwise, it would be embarking on a highly dangerous course of violations and reprisals which would ruin the protection we have precisely sought to attain for the human person in case of armed conflict.

While the principle of the equality of the Parties as to their application of the humanitarian rules of the law of armed conflicts thus appears to be a fundamental necessity, it is also desirable to specify that this principle does not have, as its consequence, preventing the punishment of those who might personally and individually render themselves guilty of serious violations of such rules. The law of armed conflict itself, in particular the Geneva Conventions, provides for this possibility of penal sanctions. But these Conventions, like the general principles of international law and like Human Rights themselves, also provide that no one can be punished for faults which he has not personally committed, and that he should be presumed to be innocent until such time as his culpability has been established by a judicial procedure affording all necessary guarantees.

Lastly, it is interesting to point out in support of the foregoing points that the Resolutions of the United Nations, which reaffirm certain principles of protection for civilian populations in case of armed conflict 1/ or which call for the observation of the Geneva Conventions in the armed conflicts of southern Africa, make no distinction in the application of these fundamental norms, which are thus valid for all involved in the armed conflict, even if one of the Parties should be qualified as the aggressor.

1/ Resolutions 2444 (XXIII) and 2675 (XXV).

5) International humanitarian law applicable in armed conflicts and the maintenance of peace

As has been previously indicated, the idea of total war has sometimes constituted a curb on the necessary development of the humanitarian law. Some have even considered that this development was incompatible with a search for the maintenance of peace and that only this search should take up the entire attention of the international community.

Very fortunately, in recent years this objection is seldom raised any more with regard to work seeking to reinforce humanitarian law. The proof of this is shown in the interest which the United Nations itself has taken, since 1967, in the problem of respect for human rights in armed conflicts, after having, for a fairly long time, maintained reservations on this point. Nowadays we understand more fully that these two efforts - for peace and for the protection of the human person in case of hostility - far from being opposed, complement each other and must be developed side by side, as the ICRC already pointed out in its Reaffirmation Report for Istanbul.

While the international community has thus again evolved toward a better understanding of the need to reinforce the humanitarian law of armed conflicts, the ICRC, for its part, with the Red Cross as a whole, is fully aware of the importance of efforts which are made to maintain or re-establish peace and understanding amongst peoples. It is with this thought in mind that the ICRC has accepted the task entrusted to it by recent international conferences of the Red Cross 1/ to endeavour, according to its means, and within the framework of its humanitarian mission, to make its contribution to measures calculated to avoiding hostilities or to putting an end to them. Because for it, and for the Red Cross as a whole, in contrast to what certain sociologists affirm, armed conflicts, no matter how serious they are, must be considered as temporary and exceptional catastrophes which men must be able to survive. Through a century of experience, the ICRC knows that the enemies of

1/ Thus, Resolution X (Red Cross as a Factor in World Peace) of the XXth International Conference of the Red Cross (Vienna, 1965), and Resolution XXI (Contacts between National Societies in cases of Conflict) of the XXIst Conference (Istanbul, 1969).

today, ravaged by frequently atrocious struggles - between nations or within a single nation - will tomorrow be called upon to resume normal relations, to co-exist and even to collaborate or be closely associated.

It is precisely in this perspective that the proposals for rules contained in this documentation are conceived. Not only does the observation of humanitarian limitations constitute an element of peace even at the height of violence, but it often contributes to paving the way toward the cessation of hostilities. It is therefore with this in mind that the ICRC, for example, proposes to reaffirm the prohibition of perfidious or treacherous acts which are likely to compromise all contact between enemies with a view to truce or cease fire 1/. It is likewise in this spirit, for another example, that it proposes rules urging, if possible, the suspension of capital punishment for captured enemies, during the hostilities 2/. And it is still from this same point of view, in connection with the protection of civilian populations, that all of these proposals for rules are put forward with a view to avoiding unnecessary suffering and destruction.

"Unnecessary", perhaps not in the light of military necessities evaluated in the field and in the heat of action, by a subordinate, but "unnecessary" when they are considered in the long view and at a superior level. That is why military necessities themselves, which it is proper to take into account in all regulations concerning armed conflicts, must also be considered from the point of view of the eventual return to peace and normal relations. Hence the imperative interest in seeing to it that limitations of a humanitarian nature to be placed on these military necessities are fixed in time of peace, in the light of experience, so that in time of conflict it will be in the foreground of the thinking of those who are responsible 3/.

1/ See Document IV, page 14.

2/ See Document V, page 59.

3/ According to its continued interest in problems relating to the maintenance of peace, consistent with the spirit of the resolutions mentioned (see ICRC Report to the Istanbul Conference on "The Red Cross as a Factor in World Peace"), the ICRC, in addition to participating in the International meetings on humanitarian law mentioned in Chapter II, delegated a senior member of its personnel to the international Seminar on mediation techniques and violence control, organized by the International Peace Academy Committee and held in Vienna during the Summer of 1970.

Chapter V

Procedure adopted for continuing work intended
to reaffirm and develop humanitarian
law in armed conflicts

This question does not figure in the list of subjects submitted to the Conference of Governmental Experts. The ICRC considered, in fact, that above all, it would be the task of this Conference to take a stand on the basic rules and that it should, in particular, make it possible to recognize which rules have sufficient acceptance to ensure progress. As indicated above in connection with the relation of some of its proposals to The Hague Conventions, it does not intend to pre-judge, at the present stage, with regard to the instruments of international law, by what exact route and under what specific forms the proposed rules could acquire the force of law and become binding on all members of the international community.

However, there is no doubt that even in the examination of fundamental questions, the experts will have occasion to give their opinion on the procedure to be adopted for the continuation of the work. The ICRC will be happy to obtain their views on this important question also.

It seems advisable here to supply a certain amount of information and data which should be kept in mind concerning this question.

In its Reaffirmation Report for Istanbul, the ICRC pointed out that, according to the majority of the experts consulted, it was, on the whole, preferable not to revise the existing Conventions, especially the Geneva Conventions, at the present time, but rather to think in

terms of new instruments of international law, particularly in the form of an additional Protocol to the existing Conventions. As will be seen, several of the concrete proposals of the ICRC have their source in this attitude.

On the other hand, the views of the experts diverged as to the path to be followed to arrive at these new legal instruments. Certain experts envisaged having these instruments established by a Diplomatic Conference such as the one which drafted the Geneva Conventions of 1949. Others thought that the United Nations channels could be used. In this respect, some experts expressed reservations preferring procedures which would enable all the States, even non-members of the United Nations, to be associated in the elaboration of the new instruments of international law to be established. Still others suggested that an intermediary stage should be intercalated between the preparatory work and the final phase, one to be marked by "declarations of principles", to be adopted ultimately within the framework of the United Nations.

Lastly, most of the experts felt that it was not necessary to think in terms of a single instrument of international law and that we should in no wise exclude the possibility of several legal instruments, each corresponding to one of the subjects envisaged and established according to different procedures. Without taking a definite stand on these different points of view, the ICRC limited itself to emphasizing, in conclusion, that it was necessary to set up instruments of international law, having a universal scope, in conformity with the principles of the Red Cross.

Procedure provided by Resolution No XIII of the Istanbul Conference

As we stated in Chapter I of this document, Resolution No XIII outlined a precise programme for the continuance of the work of the ICRC.

The Conference of Experts convened by the ICRC for next May - like the meeting of the Red Cross experts

which it convened in The Hague at the beginning of March - represents the accomplishment of number 2 of this programme which calls upon the ICRC to :

"invite governmental, Red Cross and other experts representing the principal legal and social systems in the world to meet for consultations with the ICRC on these proposals".

As the ICRC stated in its letter of invitation to the Governments, it even envisaged holding this conference of governmental experts in two sessions, if a second appeared indispensable. It could be scheduled either this Autumn or in the Spring of 1972.

The Istanbul Resolution, number 3, invites the ICRC "to submit such proposals to Governments for their comments". To follow out these instructions, the ICRC will not fail to submit the proposals it prepares at the conclusion of the Conference of Experts to all the Governments, perfectly normal measure, since it was led, in view of the Government Experts' Conference, i.e. a technical meeting with a inevitably limited number of participants, to invite only a relatively restricted number of Governments. Thus, according to this number 3, all members of the international community should have the possibility of expressing their points of view on the results of the Conference of Governmental Experts.

Lastly, number 4 of Resolution No XIII requests that the ICRC

"if it is deemed desirable, recommend the appropriate authorities to convene one or more diplomatic conferences of State parties to the Geneva Conventions and other interested States, in order to elaborate international legal instruments incorporating those proposals".

In this respect, as we see, the Resolution leaves great latitude to the ICRC. It should, in particular be pointed out that it does not exclude holding several diplomatic conferences and that it recognized the need of establishing genuine international legal instruments.

Procedure provided by Resolution No 2677 (XXV) of the
UN General Assembly

In its general Resolution on respect for human rights in armed conflicts (the full text of which will be found annexed to Document VIII), the most recent General Assembly of the United Nations likewise took up the question of the continuation of its work. In fact, among its preamble clauses, paragraph 10, the Resolution states as follows :

"Believing that one or more plenipotentiary diplomatic conferences of States parties to the Geneva Conventions and other interested States might be convened at an appropriate time, after due preparation, in order to adopt international legal instruments for the reaffirmation and development of humanitarian law applicable to armed conflict".

Elsewhere the Resolution, in its number 2, expresses the hope that the Conference of Governmental Experts would give further consideration to what development is required in existing humanitarian laws applicable to armed conflicts, and adds "that it will make specific recommendations for consideration by Governments". Thus, here too we find, as in No 3 of the Istanbul Resolution, the idea that the results of the Conference of Experts must be submitted for consideration by Governments and this must be understood to mean by all Governments.

Lastly, in No 3, Resolution 2677, among other matters, calls upon the Secretary-General to make a report to the General Assembly at its 26th Session "on the results of the Conference of Government Experts to be convened by the International Committee of the Red Cross and on any other relevant developments". And in No 4, the General Assembly "decides to consider this question again, in all its aspects, at the twenty-sixth session".

While Resolution 2677 was unanimously adopted, we must, however, point out that paragraph 10 of the preamble clauses cited above was the subject of a separate vote, marked by numerous abstentions. Indeed, during the discussion, several delegations considered that this paragraph determined the future in too fixed a manner by

speaking of "diplomatic conferences". As the report of the third Commission of the General Assembly dealing with the question shows (Document A/8178 of 4 December 1970), other delegations "strongly emphasized the fact that the possibility of such action should not impede any other form of action which might be considered advisable by the General Assembly at the following session, after it had considered the results of the conference of governmental experts which the ICRC was to convene in 1971." 1/.

In fact, on this subject, we should not neglect the contribution to the development of the law represented by the basic rules and principles contained in certain resolutions of the United Nations and which, to the extent that these Resolutions were adopted in a quasi-unanimous manner, are considered as the expression of the legal conception of the international community. Particular reference should be made to Resolution No 2444 (XXIII) of 1968 which sets up certain fundamental principles of protection in case of armed conflicts of all kinds.

More recently, at the latest General Assembly, in its Resolution No 2675 (XXV), eight fundamental principles were reaffirmed for the protection of civilian populations in armed conflicts. It is true that in affirming these principles, the General Assembly took care to underline that it was doing this "without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflicts". This idea of elaborating legal instruments which definitively ensure the legal value of the principles brought out by the General Assembly, is moreover found in other Resolutions (for example, Resolution 2674 (XXV) on "wars of liberation") or Resolution No 2673 (XXV) on the protection of journalists engaged on dangerous missions in areas of armed conflict.

In conclusion, it thus appears that while the "declaration of principles" formulated by the General Assembly can constitute a useful instrument for the development of the law - and this method has been adopted in several other fields - it is generally felt that the latter represents only an intermediate stage, until such time as a genuine instrument of international law is obtained, the validity of which is beyond question.

1/ Document A/8178, December 4, 1970, para. 21.

A N N E X E S

ANNEX I

DETAILED LIST OF SUBJECTS SUBMITTED TO THE CONFERENCE
OF GOVERNMENT EXPERTS, ATTACHED TO THE ICRC LETTER OF
INVITATION OF 22 OCTOBER 1970

I. PROVISIONAL LIST OF SUBJECTS FOR DISCUSSION

The subjects which the International Committee wishes to submit for discussion by the Conference of governmental experts are substantially the same as the ones it has submitted, in its various reports, to the XXIst International Conference of the Red Cross and which were the object, inter alia, of Resolutions XIII to XVIII. Details about these reports and resolutions are shown below (section II).

In the following list, the indications between brackets under each chapter-heading are not exhaustive and are mentioned chiefly as examples. The list does not prejudge that the International Committee of the Red Cross will suggest that the conference should examine these items in the order given.

1. Measures intended to reinforce the implementation, in armed conflicts, of existing international humanitarian law

(Dissemination of humanitarian principles and rules, national legislation for their application and instructions to be given to the armed forces - reinforcement of rules relative to the supervision of the regular observance of existing law and to the sanction of violations - Protecting Powers and their substitutes - problem of reprisals).

2. Strengthening of the protection of civilian populations against dangers of hostilities

(Reaffirmation of the immunity of the civilian population as such - distinction to be observed between non-military elements and military objectives in case of attacks - precautions to be taken as to fighting methods or the choice between different means of combat in order to spare the population - precautions to be taken by the authorities of the State to which it belongs - creation of zones or localities enjoying a particular status in view of their special protection - guarantees to be afforded to the personnel of non-military civil defence bodies).

3. Humanitarian rules relative to behaviour between combatants

(Reaffirmation and determination of the rules limiting needless forms of suffering and prohibiting certain methods of warfare : treatment of an enemy who surrenders - quarter - prohibited ruses - violation of protected emblems - problem of parachutists).

4. Protection of victims of non-international armed conflicts

(Notion and qualification of non-international armed conflicts - effective observance and development of rules applicable in these conflicts and which concern the treatment of victims and the conduct of hostilities - possible extension of certain rules to situations of internal disturbances and tensions).

5. Status of combatants and the problem of guerrilla warfare

(Possible definition and development of humanitarian rules with regard to the qualification of combatants, as well as the status and treatment of prisoners - rules relative to the conduct of hostilities in guerrilla warfare and duties incumbent upon parties to the conflict to spare the civilian population).

6. Protection of the wounded and sick

(Strengthening of existing guarantees - protection and marking of civilian medical personnel - strengthening of the safety of civilian medical transports and the problem of marking them - extension of certain rules to non-international armed conflicts).

ANNEX II

LIST OF DOCUMENTS CONSTITUTING THE DOCUMENTARY
MATERIAL PREPARED BY THE ICRC FOR THE
CONFERENCE OF GOVERNMENT EXPERTS

- I. INTRODUCTION (Document CE/1, Geneva, January 1971)
- II. MEASURES INTENDED TO REINFORCE THE IMPLEMENTATION OF THE EXISTING LAW (Document CE/2, Geneva January 1971)
- III. PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS OF HOSTILITIES (Document CE/3, Geneva, January 1971)
- IV. RULES RELATIVE TO BEHAVIOUR OF COMBATANTS (Document CE/4, Geneva, January 1971)
- V. PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (Document CE/5, Geneva, January 1971)
- VI. RULES APPLICABLE IN GUERRILLA WARFARE (Document CE/6, Geneva, January 1971)
- VII. PROTECTION OF THE WOUNDED AND SICK (Document CE/7, Geneva, January 1971)
- VIII. ANNEXES (Document CE/8, Geneva, January 1971)

ANNEX III

RESOLUTION XIII OF THE XXIst INTERNATIONAL
CONFERENCE OF THE RED CROSS
(ISTANBUL, SEPTEMBER 1969)

REAFFIRMATION AND DEVELOPMENT OF THE LAWS
AND CUSTOMS APPLICABLE IN ARMED CONFLICTS

The XXIst International Conference of the Red Cross,

considering that armed conflicts and other forms of violence which continue to rage in the world, continuously imperil peace and the values of humanity,

noting that, in order to strive against such dangers, the limits imposed upon the waging of hostilities by the requirements of humanity and the dictates of the public conscience should be continuously reaffirmed and defined,

recalling the resolutions previously adopted on this matter by International Conferences of the Red Cross and, in particular, Resolution No. XXVIII of the XXth International Conference,

recognizing the importance of the United Nations General Assembly Resolution No. 2444 adopted on 19 December 1968 on respect for human rights in armed conflicts, as well as Resolution No. 2454 adopted on 20 December 1968,

having taken note with gratitude of the work undertaken by the ICRC in this field, following Resolution No. XXVIII of the XXth International Conference and, in particular, of the extensive report which the ICRC has prepared on this subject,

underlines the necessity and the urgency of reaffirming and developing humanitarian rules of international law applicable in armed conflicts of all kinds, in order to strengthen the effective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949,

requests the ICRC on the basis of its report to pursue actively its efforts in this regard with a view to

1. proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law,
2. inviting governmental, Red Cross and other experts representing the principal legal and social systems in the world to meet for consultations with the ICRC on these proposals,
3. submitting such proposals to Governments for their comments, and,
4. if it is deemed desirable, recommending the appropriate authorities to convene one or more diplomatic conferences of States parties to the Geneva Conventions and other interested States, in order to elaborate international legal instruments incorporating those proposals,

encourages the ICRC to maintain and develop, in accordance with the United Nations General Assembly Resolution No. 2444, the co-operation established with that organisation in order to harmonize the various studies undertaken, and to collaborate with all other official and private organisations with a view to ensuring the co-ordination of such studies,

requests National Red Cross Societies to create active public interest in such a cause, which is of concern to all mankind,

urges all Governments to support the efforts of the International Red Cross in this respect.