

# Legal Division

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## II. PRINCIPLES AND LAW

### LEGAL DIVISION

As in previous years, by far the greater part of the Legal Division's activities in 1972 was devoted to work relating to the reaffirmation and development of international humanitarian law applicable in armed conflicts.

#### **CONFERENCE OF RED CROSS EXPERTS**

(Vienna, March 1972)

From 20 to 24 March 1972, the second session of the Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was held in Vienna. It was convened by the ICRC at the invitation of the Austrian Red Cross. Almost a hundred delegates represented the Red Cross and Red Crescent Societies of the following thirty-six countries: Australia, Austria, Belgium, Burundi, Canada, Czechoslovakia, Denmark, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Hungary, Indonesia, Ireland, Jordan, Democratic People's Republic of Korea, Republic of Korea, Lebanon, Liechtenstein, Netherlands, Norway, Philippines, Poland, Portugal, Romania, Saudi Arabia, Spain, Sweden, Switzerland, United Kingdom, USA, USSR, Republic of Vietnam and Yugoslavia. The League of Red Cross Societies was also represented.

The principal aim of the conference was to afford the participants an opportunity for a wide discussion of the draft texts prepared by the ICRC for the second session of the Conference of Government Experts.<sup>1</sup>

Most of the participants approved the fact that the ICRC, for the sake of simplification, had not drawn up several Additional Protocols but had dealt with all subjects in two Additional Draft Protocols, one relating to international armed conflicts and the other to armed conflicts not of an international character.

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<sup>1</sup> See page 98.

The experts were interested particularly in matters directly affecting Red Cross Societies, such as medical transport, the protection of civilian medical personnel, the use of the red cross emblem and the protection of civilian medical establishments. Measures for the safeguard of the population against the dangers arising from hostilities were also discussed, the predominating topics being the distinction between military objectives and civilian objects, respect for civilians and civilian property, and reprisals.

The relief which Red Cross Societies might be called upon to provide for conflict victims was a question which received the experts' full attention, as did the role of National Societies in the development and propagation of international humanitarian law.<sup>1</sup>

Throughout the proceedings the experts displayed keen interest in the subjects discussed, and many suggestions were put forward for submission to the second session of the Conference of Government Experts.

## **CONFERENCE OF GOVERNMENT EXPERTS**

(Geneva, May-June 1972)

Owing to the fact that the first meeting of government experts, which the ICRC had convened in Geneva from 24 May to 12 June 1971, had been unable to consider all the subjects before it, a second session was held from 3 May to 3 June 1972.

*Participation:* In view of the opinion of a large number of experts who at the first session had urged the advisability of increasing the number of participating States, on 27 September 1971 the ICRC wrote a letter to all States specifically bound by the 1949 Geneva Conventions, inviting them to send experts to the second session of the Conference of Government Experts.

*Documents:* Early in 1972, all the States invited were sent the basic documents necessary to the experts attending the second session of the Conference, namely:

— *the additional Draft Protocol to the four Geneva Conventions of 12 August 1949;*

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<sup>1</sup> See page 110.

— *the additional Draft Protocol to Article 3 common to the Geneva Conventions of 1949.*

In addition, there was a Draft Resolution on Disarmament and Peace, to be appended to the Final Act of a possible Diplomatic Conference.

These two Protocols and the Draft Resolution were assembled in a volume entitled " Basic Texts ".

Each of the articles in " Basic Texts " was covered by brief comments, in two volumes entitled " Commentary ".

*Missions to Africa:* At the first session, some African delegates expressed the wish that the ICRC organize a seminar in Africa in order to enable the Governments of that continent to play a more active part in the work of the second session. Two seminars were to be held, one in Addis Ababa and the other in Yaoundé, the respective seats of the two ICRC regional delegations in Africa. The preliminary steps taken by the ICRC regional delegates, however, showed that such seminars would not achieve the proposed aim. Financial difficulties appeared to hamper a number of African States and prevent them from sending experts to the seminars. The ICRC therefore thought it advisable to replace the two seminars by itinerant missions carried out by qualified jurists, who, in the principal African States, would have easier access to the government officials concerned.

Consequently, from 19 February to 10 March, Mr. Jean Mirimannoff-Chilikine, legal adviser, accompanied by Mr. Ulrich Bédert and subsequently by Mr. André Tschiffeli, regional delegates, went to the capitals of the following eight countries: Cameroon, Dahomey, Ghana, Ivory Coast, Liberia, Nigeria, Senegal and Zaire.

The second mission, from 3 to 20 March, was entrusted to Mr. René Wilhelm, Assistant Director, accompanied either by Mr. Roger Santschy or Mr. René Weber, regional delegates. The following five countries were visited: Ethiopia, Kenya, Sudan, Tanzania and Uganda.

In each country, the ICRC representatives conferred with the ministers concerned and with National Society officers. They explained the work which the ICRC was doing, particularly the draft instruments to be submitted at the second session, for the reaffirm-

ation and development of international humanitarian law, and endeavoured to prevail upon the countries visited to participate in that session.

## *SECOND SESSION OF THE CONFERENCE*

About 400 experts, delegated by seventy-seven Governments, attended the second session of the Conference of Government Experts on the Reaffirmation and Development of International Law in Armed Conflicts, held in Geneva from 3 May to 3 June 1972. The proceedings were also followed by United Nations representatives, nine technical experts (specializing in medical transport problems), ten observers from non-governmental organizations, the League of Red Cross Societies and a number of National Societies.

The opening of the Conference was marked by an official ceremony, at which addresses were delivered by Mr. Marcel A. Naville, President of the ICRC; Mr. Henri Schmitt, President of the Council of State of the Republic and Canton of Geneva, and Mr. Marc Schreiber, Director of the United Nations Human Rights Division, representing the UN Secretary-General.

Three plenary sittings were held, in the course of which the Conference elected its bureau as follows: Mr. J. Pictet (ICRC), Chairman; Mr. W. Riphagen (Netherlands), Mr. A. Cristesco (Romania) and Mr. P. Matagan (Cameroon), Vice-Presidents, and Mr. P. Gaillard (ICRC), Secretary General. The two additional Draft Protocols to the 1949 Geneva Conventions, drawn up by the ICRC, were then studied by four Commissions.

*Commission I:* Commission I was concerned with the protection of the wounded and the sick in international armed conflicts. At the close of its work, it produced a complete text comprising provisions relating to the three main items: protection of civilian medical personnel, units and institutions, to be provided with the same immunity as granted to military medical personnel and units under the Geneva Conventions; medical air transport, and, lastly, the position of National Red Cross Societies and other relief bodies.

The principle of extending protection to civilian medical personnel and all kinds of civilian medical institutions—whether per-

manent or temporary, public or private—was accepted and considered as one of the principal additions to the Geneva Conventions.

The experts approved the proposal that medical institutions enjoying protection should be duly recognized by the competent authorities of the State within whose territory they operated, in order to avoid any abuse. The question of marking medical institutions in time of peace and in time of war, concerning which tests had been carried out, was also discussed.

The Commission also considered the question of protection for the individual. The experts felt that any act endangering health (physical mutilation, medical and scientific experiments, including the grafting or removal of organs), not justified by medical treatment, should be prohibited.

Protection for the medical mission was a matter which was considered by the experts, who largely accepted the principle of immunity, i.e. that a person should not be punished for having carried out medical activities, whoever benefited by it, or be compelled to commit acts contrary to the ethics of duty.

The question of medical air transport was carefully studied. Here again, the Commission and the experts in air navigation and signaling succeeded in drawing up complete regulations which should allow the resumption of operations by medical aviation immune from attack.

Lastly, the Commission considered the position of National Red Cross Societies and other bodies performing humanitarian and impartial activities, for which provisions were drawn up to ensure special facilities.

*Commission II:* Commission II dealt with *non-international armed conflicts*. The victims of such conflicts are at present protected by Article 3 common to the four Geneva Conventions of 1949.

The ICRC submitted to the experts for their consideration an additional Draft Protocol developing Article 3 and consisting essentially of provisions based on those of the 1949 Geneva Conventions. The need for the development of Article 3 was accepted. Most of the experts expressed the hope that the specific nature of that type of armed conflict would be borne in mind and appropriate rules established in a separate Protocol.

The definition of armed conflict not of an international character was one of the questions discussed. Differing views were voiced.

All experts were agreed on the need to give captured combatants humane treatment throughout their captivity. This was an important step forward, because Article 3 made no provision in that respect.

Relief was a question of special importance. In the course of a great many armed conflicts not of an international character, hunger had sometimes been cruelly felt, and the wounded and the sick had not always received timely care. The ICRC was therefore expressing the concern of the international community as a whole in formulating provisions designed to facilitate humanitarian assistance and to strengthen the action of National Red Cross Societies and other relief organizations. On the whole, the ICRC proposals were welcomed.

*Commission III:* Commission III dealt with three subjects:

- (1) *protection of the civilian population against dangers of hostilities;*
- (2) *combatants;*
- (3) *protection of journalists engaged in dangerous missions.*

*The protection of the civilian population against dangers of hostilities* (as they stand, the Geneva Conventions protect civilians against arbitrary action by the enemy authorities in whose power they happen to be, for instance, in the case of occupation) is closely linked with the use of weapons. Many experts considered that there should be an express prohibition. The proposals put forward revealed various tendencies ranging from a specific prohibition of ABC weapons to a prohibition of new conventional weapons (liable to cause needless suffering or particularly cruel). It was held desirable that a meeting of experts (scientists, army experts, doctors and jurists) should be convened within the next few months, to study technical data relating to those categories of weapons.

The definition of civilian population and of objects of a civilian character gave rise to prolonged discussion. The experts reaffirmed that attacks against the civilian population were prohibited, but with regard to civilians indirectly exposed to danger (if in the vicinity of such military objectives as barracks, arms factories, etc.), different

viewpoints were expressed about the measures of precaution recommended by the ICRC. Lastly, most of the experts supported the idea of developing the "open city" concept.

The experts also dealt with the question of civil defence organizations. It was considered that those bodies should be able to fulfil their duties, not only in occupied territory, but in areas of military operations as well. It was hoped to find, for those bodies, an internationally recognized emblem which might be used both in international and in non-international armed conflicts.

The second subject concerned *combatants* and was related to the reaffirmation and development of certain rules limiting the methods and means of warfare and safeguarding the condition of combatants placed *hors de combat*. As regards the treatment of captured guerrillas, the Commission largely agreed with the ICRC's proposals that the conditions laid down in international law regarding recognition of prisoner-of-war treatment should be made more flexible.

Finally, Commission III discussed *the protection of journalists engaged in dangerous missions*, a question on which the United Nations wished to know the views of the government experts. Most of the experts considered that, if the majority of States favoured special protection, suitable rules should be drafted and the United Nations supported in its efforts.

*Commission IV: Commission IV considered measures intended to reinforce the implementation of the law.*

In the first place, the Commission considered questions related to international assistance in the application and the supervision of application. It was of the opinion that it was necessary to reinforce the international machinery designed to ensure and facilitate impartial supervision of the implementation of the Geneva Conventions. It considered it advisable, in particular, to specify the system for the appointment of Protecting Powers and their substitutes. Many experts thought it would be advisable to fix a time-limit within which a Protecting Power or substitute would be appointed or accepted. As the substitute for the Protecting Power, some experts favoured the automatic appointment of the ICRC, while others thought it would be preferable to appoint a substitute—whether it be the ICRC or some other humanitarian body—with the agreement of the Parties



concerned. A third view was to set up a permanent body, in the United Nations for instance, to act as substitute.

The Commission also dealt with the provisions on penal sanctions in the Conventions and in the Additional Protocol which was being prepared. In particular, the inclusion of a provision allowing a subordinate to refuse to obey an order that would entail committing a breach of the Conventions was examined.

The experts reaffirmed the need for a wide and effective dissemination of the Geneva Conventions and the Additional Protocols.

The Commission also studied the application of humanitarian law in armed struggle for self-determination. By a large majority, the experts turned down a preliminary draft Declaration on the subject. Some considered such a struggle to be an international conflict and hence covered by the Geneva Conventions as a whole, while others regarded it as a non-international armed conflict covered by Article 3 and the Additional Protocol to that article.

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At the close of the second session of the Conference of Government Experts, the Swiss representative announced that his Government intended to call a Diplomatic Conference early in 1974.

The President of the ICRC addressed the closing meeting and outlined future work regarding the reaffirmation and development of international humanitarian law applicable in armed conflicts. He said:

... First of all, the ICRC will draw up a full report on the work of this second session. The most important part of this document will consist of the texts presented to you and the reports of the four Commissions...

Secondly, the ICRC will draw up the texts of new Additional Protocols in the light of all the views expressed at the present session of the Conference of Government Experts.

The drafting of some of these texts, for example those concerning subjects discussed by Commission I, is almost completed.

For some of the other subjects, however, the ICRC will have to make a selection, and it will be necessary to draw up new texts. The questions studied in Commissions II, III and IV fall into this category.

In this connection, the ICRC plans, where necessary, to undertake further consultations either by calling together a small number of experts in Geneva or by consulting certain experts individually. Naturally, it will keep in close touch with the United Nations on those matters of which the United Nations has been asked to make special studies.

In any event, the ICRC intends to present the new Draft Protocols to the Swiss Government as the Depositary State of the Geneva Conven-

tions some time next spring, for communication to the governments of the States Parties to the Conventions. In this way these governments will be able to examine them before the Diplomatic Conference meets. The Draft Protocols will also be presented to the XXIIInd International Conference of the Red Cross to be held in the autumn of 1973.

### **Report on the Work of the Conference**

The Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, drawn up by the ICRC, was issued in September 1972. It was published in English, French and Spanish in two volumes: Volume I, consisting of 209 pages, contained the list of participants at the Conference, a report on the initial and final plenary meetings, and the reports of the four Commissions which studied the different subjects under discussion. Volume II contained the proposals and amendments put forward by the experts.

The Report on the Conference was sent to all Governments Parties to the 1949 Geneva Conventions and to all National Red Cross Societies. In addition, several hundred copies were sent to the United Nations for the twenty-seventh session of the General Assembly, for the Commission responsible for studying the question of respect for human rights in armed conflicts.

### **Consultations with experts**

With a view to drafting new texts of additional Protocols for submission to the Diplomatic Conference, the ICRC convened the following meetings of experts scheduled to be held early in 1973:

- Advisory Group of Government Experts
- Meeting of Experts on Markings for Civil Defence Services
- Meeting of Experts on Penal Law
- Meeting of Experts on Signalling and Identification Systems for Medical Transports by Land and Sea.

These meetings, which were suggested to the ICRC by several government experts, were meant to help the ICRC make a selection among the solutions proposed at the second session of the Conference of Government Experts, regarding various important questions.

In addition, it is planned to call a meeting of experts on the use of such conventional weapons as may cause unnecessary suffering or have indiscriminate effects, the Government Experts having asked the ICRC to make a special study of that subject.

## **RELATIONS WITH THE UNITED NATIONS**

*Meeting of Experts on Napalm:* In resolution 2852 (XXVI) adopted at its twenty-sixth session, the General Assembly of the United Nations requested the Secretary-General to prepare as soon as possible, with the help of qualified governmental consultant experts, a report on napalm and other incendiary weapons and all aspects of their possible use.

The first session of the group of experts was held at United Nations headquarters in New York, in May. Although invited to send a representative, the ICRC was unable to accept the invitation because the Conference of Government Experts was being held at that time. It was, however, able to send Mr. Giorgio Malinverni, legal adviser, as an observer to the second session, also held in New York, from 24 July to 4 August, and to the third session, held at the Palais des Nations, Geneva, from 28 August to 1 September.

*Twenty-seventh session of the General Assembly:* The proceedings of the twenty-seventh session of the United Nations General Assembly, which took place in New York from 19 September to 19 December 1972, were followed by Mr. A. Dominique Micheli, ICRC delegate to international organizations.<sup>1</sup> Mr. Claude Pilloud, Director, was present at the discussions regarding "Respect for human rights in armed conflicts".

The General Assembly had before it a report of the Secretary-General on the work of the second session of the Conference of Government Experts. On the recommendation of the Sixth Committee, which was able to give only limited time to an examination of that agenda item, the General Assembly adopted a resolution which is quoted below in full.

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<sup>1</sup> See page 122.

## RESOLUTION 3032 (XXVII)

### *Respect for human rights in armed conflicts*

*The General Assembly,*

*Conscious* that only complete respect for the Charter of the United Nations and general and complete disarmament under effective international control can bring about full guarantees against armed conflicts and the suffering caused by such conflicts, and determined to continue all efforts to these ends,

*Conscious* that the development of many weapons and methods of warfare has made modern armed conflicts increasingly cruel and destructive of civilian lives and property,

*Reaffirming* the urgent need to ensure full and effective application of existing legal rules relating to armed conflicts and to supplement these rules by new ones in order to take into account the modern developments in methods and means of warfare,

*Noting with concern* that the existing legal rules and obligations relating to human rights in armed conflicts are being frequently disregarded,

*Recalling* the successive resolutions adopted by the United Nations relating to human rights in armed conflicts, in particular General Assembly resolutions 2852 (XXVI) and 2853 (XXVI) of 20 December 1971, and resolution XIII adopted by the twenty-first International Conference of the Red Cross, held at Istanbul in 1969, concerning the reaffirmation and development of the laws and customs applicable in armed conflicts,

*Noting with appreciation* the report of the Secretary-General on the results of the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which was held at Geneva from 3 May to 3 June 1972 at the invitation of the International Committee of the Red Cross,

*Having taken cognizance* of the report prepared by the International Committee of the Red Cross on the work of the Conference of Government Experts,

*Expressing appreciation* to the International Committee of the Red Cross for its dedicated efforts to promote the reaffirmation and development of international humanitarian law applicable in armed conflicts,

*Emphasizing* the importance of continued close collaboration between the United Nations and the International Committee of the Red Cross,

*Welcoming* the progress achieved at the second session of the Conference of Government Experts,

*Noting with concern*, nevertheless, that agreement has not emerged among government experts on drafts concerning a number of fundamental issues, such as:

(a) Methods to ensure a better application of existing rules relating to armed conflicts,

(b) Definitions of military objectives and protected objects, in order to counter the tendency in armed conflicts to regard ever growing categories of objects as permissible targets for attack,

(c) Definitions of protected persons and combatants, responsive to the need for improved protection of civilians and of combatants in modern armed conflicts,

- (d) The question of guerrilla warfare,
- (e) Prohibition of the use of weapons and methods of warfare which indiscriminately affect civilians and combatants,
- (f) Prohibition or restriction of specific weapons which are deemed to cause unnecessary suffering,
- (g) Rules facilitating humanitarian relief in armed conflicts,
- (h) Definition of those armed conflicts of a non-international character which should be subject to rules additional to those contained in the Geneva Conventions of 1949,

*Considering* that substantial progress on fundamental issues such as those enumerated above is indispensable if the efforts to supplement international humanitarian law by new rules are to become significant for the alleviation of the suffering brought by modern armed conflicts,

*Welcoming* the readiness of the Swiss Federal Council, as communicated to the Secretary-General, to convoke a diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts,

*Believing* that the further preparations for that conference as well as its organization must be such that substantial progress is achieved on fundamental issues which are as yet unresolved,

*Expressing its appreciation* to the International Committee of the Red Cross for undertaking a series of consultations to ensure the complete preparation for the conference,

1. *Urges* all Governments and invites the International Committee of the Red Cross to continue to seek through consultations to achieve a rapprochement in the positions of Governments to ensure that the diplomatic conference envisaged will adopt rules which will mark substantial progress on fundamental legal issues connected with modern armed conflicts and which will contribute significantly in the alleviation of the suffering brought by such conflicts;

2. *Calls upon* all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949, and, to this end, to provide instruction concerning these rules to their armed forces and information concerning the same rules to the civilian population;

3. *Requests* the Secretary-General to encourage the study and teaching of principles of respect for international humanitarian rules applicable in armed conflicts;

4. *Requests* the Secretary-General to report to the General Assembly at its twenty-eighth session on relevant developments concerning human rights in armed conflicts and to prepare, as soon as possible, a survey of existing rules of international law concerning the prohibition or restriction of use of specific weapons;

5. *Decides* to include in the provisional agenda of its twenty-eighth session the item entitled " Human rights in armed conflicts: respect for human rights in armed conflicts ".

## **RELATIONS WITH VARIOUS INTERGOVERNMENTAL AND NON-GOVERNMENTAL ORGANIZATIONS**

In 1972, the ICRC took part in the following meetings. In co-operation with the Henry Dunant Institute, it conducted special courses on the law of armed conflict, in the context of the courses on human rights held in July every year by the International Institute of Human Rights (René Cassin Foundation) at the University of Strasbourg. Under the general heading of "International Protection of Human Rights", Mr. Jean Pictet, Vice-President of the ICRC, gave a course on "Humanitarian Law and the Protection of War Victims", while four other courses were conducted by different speakers on "Human Rights and the Law of Armed Conflict".

Mr. Claude Pilloud, Director, and Mr. Antoine Martin, assistant to the head of the ICRC Legal Division, attended as observers the congress of the International Society for the Study of Comparative Public Law, held in Geneva from 15 to 18 August. The theme was: "The necessity of amending national public law in the area of war crimes, crimes against the peace and crimes against humanity, to honour fully a nation's obligations under the Geneva Conventions and developing international law".

Mrs. Danièle Bujard, legal adviser, represented the ICRC at the fifth General Assembly of Amnesty International, held at Zeist, near Utrecht, from 8 to 11 September, to consider problems relating to torture, the death penalty and the implementation of minimum rules for the treatment of detainees.

The Sixth International Seminar for Young Army Doctors was held at Libourne, near Bordeaux, from 18 to 28 September. The ICRC was represented by Mr. Frédéric de Mulinen, Head of Division, who read two papers, one on "The ICRC and the Army Medical Services" and the other on "Signalling and Identification of Medical Personnel and Material".

The International NGO Conference on Disarmament was held in Geneva from 25 to 29 September. The ICRC attended as an observer.

From 3 to 5 October, Mr. Philippe Eberlin, technical adviser, was in Mainz, where he attended the International Symposium on the Role of Helicopters and Aeroplanes in Search and Rescue, organized by Professor R. Frey, Director of the Institute of Anaesthesiology of Mainz University Clinic.

Lastly, Mr. Jean Pictet, Vice-President; Mrs. Denise Bindschedler, member of the ICRC, and Mr. Michel Veuthey, legal adviser, represented the ICRC at the Seminar on the Teaching of Humanitarian Law in Military Institutions, held by the San Remo International Institute of Humanitarian Law from 6 to 18 November.

## **OTHER ACTIVITIES**

### *Further accessions to the Geneva Conventions*

In 1972, two States formally became parties to the Geneva Conventions of 1949. They were Bangladesh (declaration of continuity dated 4 April 1972) and the United Arab Emirates (accession on 10 May 1972).

The dates are those on which the official instruments were received by the Swiss Federal Council.

Thus, by the end of the year 133 States were parties to the Geneva Conventions of 1949.

### *Recognition of National Societies*

On 14 September, the ICRC announced the official recognition of the Bahrain Red Crescent Society, which brought the number of National Societies to 116.

## **DOCUMENTATION AND DISSEMINATION DIVISION**

### **DISSEMINATION OF PRINCIPLES AND CONVENTIONS**

#### *Plan of Action to be Applied by National Societies in Spreading Knowledge of and in Developing International Humanitarian Law Applicable in Armed Conflicts*

In the context of the Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Vienna from 20 to 24 March 1972, one of the topics considered was the role of National Societies in the propagation and development of international humanitarian law and the assistance which they could give the ICRC at that meeting. In view of the recommendation of the National Societies during the meeting at The Hague in February 1971, the ICRC drew up a plan