

# CRYSTALLISING AN EMBLEM: ON THE ADOPTION OF THE THIRD ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS<sup>1</sup>

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## 1. INTRODUCTION

In the early morning of Thursday 8 December 2005, a Diplomatic Conference of the States Parties to the Geneva Conventions, convened in Geneva, adopted the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem (hereinafter, Third Protocol). The Third Protocol creates an additional emblem alongside the existing emblems recognised by the Geneva Conventions. It represents a landmark solution of long-standing problems regarding the use of distinctive emblems for the protection of war victims and the universality of the International Red Cross and Red Crescent Movement (hereinafter, Movement). Yet, the failure to adopt the Third Protocol by consensus was a disappointment to many, even those familiar with the controversies of the question of the emblem.<sup>3</sup>

Since the Nineteenth Century, the emblems recognised by the consecutive Geneva Conventions<sup>4</sup> have served both as protective emblems for national military and civilian medical services in times of war and as distinctive signs for National Red Cross and Red Crescent Societies. Almost since their adoption, however, the emblems have been a source of recurrent difficulties and the subject of almost continuous discussion. The two emblems that in effect have been in use over the past decades – the red cross and the red crescent – have increasingly been perceived not as neutral and impartial but as having religious, cultural or political connotations. This has negatively affected respect for the emblems and diminished the protection they offer to victims and to humanitarian and medical personnel.<sup>5</sup> Solving this problem was one of the two main reasons for adopting an additional emblem.

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<sup>3</sup> The authoritative account of the history and adoption of the Third Protocol is Francois Bugnion's *Towards a comprehensive solution to the question of the emblem*. It was of invaluable use for the outline of this article. The first edition was originally published in the *International Review of the Red Cross* (IRRC), No. 838 (2000), and reprinted as a separate brochure published by the ICRC in Geneva in August 2000. Unless otherwise indicated, the footnotes refer to the revised fourth edition (ICRC, Geneva, 3 April 2006).

<sup>4</sup> See A. Roberts and R. Guelff (ed.), *Documents on the laws of war* (3<sup>rd</sup> ed. OUP, Oxford 2000 [2002]), pp. 4-7.

<sup>5</sup> There are many examples. During the Lebanese civil war (1975-1990) in predominantly Muslim or Druze regions a Lebanese Red Crescent Society was set up to rival the Lebanese Red Cross Society. In Cyprus a society using the red crescent operates in the northern part of the island. In October 2003 the ICRC headquarters in Baghdad was deliberately attacked. In Iraq in recent years movement relief goods in areas under control of armed opposition groups were distributed in bags without either the red cross or the red crescent, the cross being seen as 'western', related to the foreign military forces, the crescent as linked to the government (see e.g. *Iraqis seek aid without crosses*, *The Washington Times*, 19 October 2005).

The second issue in need of resolution, which increasingly dominated the process and debate leading to the adoption of the new red crystal, was the problem of the membership in the Movement of National Societies of those countries where neither the red cross nor the red crescent could be used. One example was the situation in Eritrea, which had expressed the wish to use both the red cross and red crescent together, which was not possible under the existing rules. The most prominent example, however, was Israel's National Society, known as the Magen David Adom in Israel (hereinafter, MDA – the red shield of David) established in 1930.<sup>6</sup> MDA, which used the Red Shield of David as its sole title and emblem, was not recognised as a National Society by the International Committee of the Red Cross (hereinafter, ICRC) nor admitted as a member of the International Federation of Red Cross and Red Crescent Societies (hereinafter, Federation), as the statutes of the International Red Cross and Red Crescent Movement (hereinafter, Movement) require a society to use the name and emblem of the Red Cross or Red Crescent in conformity with the Geneva Conventions.<sup>7</sup> Over the years, many regarded this as an unwarranted act of discrimination towards MDA, violating the spirit of impartiality and universality and political and religious independence of the Movement. Others found it an offensive interference in the internal affairs of the Jewish people and the state of Israel – ‘a cause of rancour’.<sup>8</sup>

There was a widespread misconception that the ICRC or the Movement was in a position to solve these issues by themselves. Amending the applicable international law and statutes of the Movement requires the explicit cooperation and consent of the assembly of all States Parties to the Geneva Conventions,<sup>9</sup> which means in effect all the states of the world.

Two different legal regimes apply to the emblems. Firstly, the various provisions of the Geneva Conventions and the Additional Protocols.<sup>10</sup> Only a conference of the States Parties to the Geneva Conventions may amend those provisions. Secondly, the provisions of the Statutes of the Movement and of the Constitution of the Federation relating to the emblem and the name and recognition of national societies.<sup>11</sup> Only an International Conference of the Red Cross and Red Crescent – consisting of representatives of all components of the Movement and representatives of all States Parties to the Geneva Conventions, with all of these delegations having equal voting rights – has the competence to amend the Movement's statutes.<sup>12</sup>

While the Movement has always fulfilled a crucial catalyst function in the adoption of instruments of international humanitarian law, only states can create the law. From the outset, it was clear that international politics would have a great impact on the adoption of the Third Protocol. Ever since the adoption of the 1949 Geneva Conventions just after the emergence of Israel as an independent State it was evident that the politics of the Middle East would have a decisive effect on the will of many states to settle the issue of the emblem, and hence the

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<sup>6</sup> See the society's website <[www.mdais.org](http://www.mdais.org)>. Also: Shabtai Rosenne, *The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David*, pre-print, Israel Yearbook on Human Rights, Vol. 5, 1975, Tel Aviv University and Felice Gaer, *Israel and the International Red Cross and Red Crescent Movement: the status of Magen David Adom* (The American Jewish Committee, New York 2000).

<sup>7</sup> Art. 4 Statutes of the International Red Cross and Red Crescent Movement of 8 November 1986 (hereinafter, Statutes); Art. 6 Constitution of the Federation of 26 November 1987 (hereinafter, Constitution). The Movement is composed of the recognised National Red Cross and Red Crescent Societies, of the ICRC and of the International Federation of Red Cross and Red Crescent Societies.

<sup>8</sup> Rosenne (n 6), p. 3; also: Timothy McCormack, *What's an emblem? Humanitarian assistance under any other banner would be as comforting*, 1 Melbourne JIL (2000), pp. 179-180. Since 2000 the American Red Cross by way of protest has halted funding to the Federation.

<sup>9</sup> Cf. art. 39-40 of the Vienna Convention on the Law of Treaties.

<sup>10</sup> Bugnion (n 3) p. 25-26.

<sup>11</sup> Id., pp. 26-27

<sup>12</sup> Statutes, art 8-10. Amendment of the Constitution requires a qualified majority, see Art. 38.

question of recognition of MDA.<sup>13</sup> This proved to be very true in the case of the Third Protocol.

This article briefly traces the background of the question of the emblem, leading to the diplomatic conference of December 2005 (part 2). It discusses some of the crucial negotiations and the course of the diplomatic conference (part 3), some substantive issues regarding the use of the Red Crystal (part 4) and some steps to be taken in order to implement the Third Protocol (part 5).

## 2. BACKGROUND<sup>14</sup>

The 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field expressly mentioned three emblems, the red cross, the red crescent and the red lion and sun.<sup>15</sup> One of the many aims of the Diplomatic Conference convened in 1949 to revise the existing Geneva Conventions in the aftermath of the Second World War was to deal with these signs, the danger of proliferation and the challenge to universality. It had three main proposals before it: (a) a proposal by the Netherlands for the adoption of a new single sign; (b) the recommendation of the 17th International Conference of the Red Cross, meeting in Stockholm in 1948, to revert to the unity of the red cross sign and (c) an Israeli proposal for the recognition of a new emblem, the red shield of David, which was used as the distinctive sign of the Israeli armed forces medical services.<sup>16</sup>

These proposals gave rise to lengthy discussions. The first two were abandoned after some debate. The third was put to a vote but rejected by a narrow majority.<sup>17</sup> Israel nevertheless signed and ratified the Conventions subject to the reservation that, while respecting the inviolability of the distinctive signs and emblems of the Convention, it would use the red shield of David as the emblem and distinctive sign of the medical services of its armed forces.<sup>18</sup>

During the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law of 1974-1977, which led to the adoption of the first and second Additional Protocols to the Geneva Conventions, Israel again attempted to gain international recognition for the sign of the red shield of David. However, seeing that there was no prospect of obtaining the necessary majority vote, the Israeli delegation withdrew its proposal rather than risk a negative vote, which would have amounted to rejection of its emblem on the international level.<sup>19</sup>

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<sup>13</sup> Bugnion, 1<sup>st</sup> ed. (n 3), p. 28.

<sup>14</sup> For a comprehensive historical overview see Jean Pictet, *The Sign of the Red Cross* (ICRC, Geneva 1949) and Francois Bugnion, *The Emblem of the Red Cross* (ICRC, Geneva 1977).

<sup>15</sup> Persia claimed and secured the right to use the emblem of the red lion and sun at the 1899 Hague Conference. On 4 September 1980, the Islamic Republic of Iran waived its right to use the emblem and adopted the red crescent. The sign of the red lion and sun has not been used since. The Statutes of the Movement as revised in 1986 mention neither the emblem nor the name of the red lion and sun.

<sup>16</sup> Bugnion (n 3), p. 15 and Rosenne (n 6), pp. 1-4.

<sup>17</sup> *Final Record of the Diplomatic Conference of Geneva of 1949* (4 Vols. Federal Political Department, Bern 1949), Vol. II-A, pp. 89-92 and 187; Vol. II-B, pp. 223-232 and 255-262. The outcome was Art. 38 of the first Geneva Convention of 1949, which repeats almost word for word Art. 19 of the 1929 Convention.

<sup>18</sup> *Final Record 1949* (n 17) Vol. II-B, p. 534; for the text of the Israeli reservation, see id., Vol. I, p. 348. Only two States formally raised objections to the Israeli reservation: Lebanon and the United States of America.

<sup>19</sup> *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977 (17 Vols. Federal Political Department, Bern 1978), Vol. III, p. 14 and Vol. IX, pp. 462-467

Apart from Israel, the only state ever to file a reservation regarding the use of a deviant emblem was Kazakhstan.<sup>20</sup> Over the years, however, many proposals and requests for adopting a variety of different emblems have been made. The possibility of proliferation of the emblems has always been perceived as a real risk. The adoption of the additional emblem increasingly came to be seen as the best way of putting an end to the risk of proliferation.<sup>21</sup>

### 3. THE ADOPTION OF THE THIRD PROTOCOL (1992-2000 AND 2005)

#### 3.1 The drafting history

In 1992 Cornelio Sommaruga, the then-President of the ICRC, called publicly for the creation of an additional emblem, 'graphically simple' and 'devoid of any religious, political, ethnic or other connotation'.<sup>22</sup> This appeal sparked a new debate and led to various initiatives aimed at finding a comprehensive solution to the question of the emblem. In the years to follow the idea of creating a 'new sign' gained momentum. It was also recognised that the entire process leading up to a broadly accepted solution would have to be the subject of extensive consultations. The result was a decision by the Standing Commission<sup>23</sup> elected at the 26<sup>th</sup> International Conference in 1995 to form a working group with representatives of governments, National Societies, the ICRC, the Federation and others interested in the issue. The working group, chaired by Mrs Christina Magnuson of Sweden, distilled the various proposals brought to it into six alternatives, including the replacement of the existing emblems with a single new one. Ultimately, the working group recommended and the Movement agreed that the best option was the establishment of an additional emblem designed in a way to allow the insertion in it of for example the red shield of David. The 27<sup>th</sup> International Conference, in December 1999, accepted this as the way forward and asked the Standing Commission to continue its work through a formally constituted group comprising representatives of governments, National Societies, the ICRC and the Federation. Its mandate was defined by the International Conference as to 'to find a comprehensive solution, as rapidly as possible, which is acceptable to all parties in terms of substance and procedure'.<sup>24</sup>

In April 2000 representatives of 15 states<sup>25</sup> and the Movement were convened by the Standing Commission as the newly established Joint Working Group on the Emblem. It was determined that the only means of finding a comprehensive and widely accepted solution to the question Such a protocol would introduce an additional emblem, to be used alongside the existing emblems described in the Geneva Conventions. The new emblem should be designed in such a way as to enable a National Society using it to insert within it any indicative sign that it already used for that purpose. In accordance with the mandate conferred on it by the

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<sup>20</sup> The reservation of 1993 concerned the use of both the red cross and red crescent. It was revoked in 2001 when Kazakhstan adopted the red crescent as its unique emblem, Bugnion (n 3), p. 29. Kazakhstan's reservation was filed out of time, which is the main reason why Art. 3 of the Third Protocol does not refer to a reservation but uses the contorted language it does.

<sup>21</sup> Bugnion (n 3), p. 28-30. The fact that the Third Protocol means the end of the question of proliferation, and that no other emblem would be adopted was repeatedly emphasised in the press briefings of the Movement after the adoption.

<sup>22</sup> Cornelio Sommaruga, *Unity and plurality of the emblems*, IRRC No. 289 (1992), pp. 333-338.

<sup>23</sup> The Standing Commission of the Red Cross and Red Crescent is the trustee of the International Conference of the Red Cross between two conferences (Art. 16, Statutes)

<sup>24</sup> Resolution 3 of the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, December 1999.

<sup>25</sup> China, Colombia, Egypt, France, India, Iran, Israel, Kazakhstan, Lebanon, Malaysia, the Russian Federation, Senegal, Switzerland, the United Kingdom and the United States.

international community,<sup>26</sup> the ICRC, in consultation with the International Federation, drew up the draft protocol and its emblem.

### 3.1.1 *The design and name of the additional emblem*

#### 3.1.1.1 The design

In 1999, no choice had yet been made as to the appearance of the additional emblem. A group of Movement experts on the emblem, discussing the issue in the summer of 1999, referred in their documentation to the sign as ‘red diamond’ as a result of which this term became informal shorthand for the additional emblem.<sup>27</sup> After the 27<sup>th</sup> International Conference of November 1999 and upon the request of the Joint Working Group on the Emblem, a small sub group drawn from both the ICRC and the Federation was created to consider the design issue. It decided to ask several external design consultancies to help.<sup>28</sup> They presented their ideas in May 2000. In all, 36 designs, together with numerous variations, were considered. Most fulfilled the criteria of graphical simplicity and no national, political or religious connotation, and were tested for pre-existing use or cultural sensitivity through web searches and among the 50 nationalities at the Federation's secretariat. Initially, both the ‘red diamond’, an entirely red square, and a red double chevron design gained favour.<sup>29</sup> The concern expressed regarding the double chevron design was the confusion or even possible misuse created by the gap between the two chevrons. As a result, at an internal meeting at the ICRC, the chevrons were closed, making a red square on its point with a white area in its centre.

With the support of the Swiss army, the ICRC conducted visibility tests to ensure that the new emblem had the same visual qualities as the red cross and the red crescent.<sup>30</sup> These tests proving satisfactory, it was the red square on its point, slightly adjusted so that the white area in the centre was somewhat larger than in the initial design, which was agreed on by the Joint Working Group and eventually incorporated into the draft third protocol of 12 October 2000.

#### 3.1.1.2 The name

The draft, however, contained no proposal for a name, the text of Article 2(2) referring simply to ‘the third protocol emblem’.<sup>31</sup> The search for a name took place in 2001, when the Joint Working Group asked the ICRC and the Federation to work on a possible name for the additional emblem. An ICRC and Federation sub group, with the assistance of two consultancy firms,<sup>32</sup> defined seven criteria for this process: the name had to be politically, religiously and linguistically neutral, simple to pronounce, especially in the official languages of the Movement; pro-active sounding while maintaining gravitas, defensible at the highest level and worthy to stand alongside the existing emblems. After the first brainstorming

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<sup>26</sup> Under Art. 5(2)(g), of the Statutes, the ICRC's role is inter alia ‘to work for the understanding and dissemination of knowledge of international humanitarian law ... and to prepare any development thereof’.

<sup>27</sup> See the comprehensive account in: Ian Piper, *Note on the process leading to the proposed design and name of the third protocol emblem* (ICRC, Geneva 31 May 2005).

<sup>28</sup> *Magic Pencil* (Switzerland), *Grafik Design* (Austria), *Open* (UK) and *The Design Distillery* (UK).

<sup>29</sup> See the brochure *Towards an additional emblem: an explanatory guide*, ICRC, Geneva, June 2000. The red chevron resembled the current Red Crystal, but had a horizontal white gap across the middle creating two chevrons facing each other. For the entirely red diamond, in which other emblems could be incorporated in a small white square at the bottom, see also Bugnion, 1<sup>st</sup> ed. (n 3), Annex, p. 47.

<sup>30</sup> Bugnion (n 3), p. 43.

<sup>31</sup> In this respect it is interesting to note that the Art. 7 of the very first Geneva Convention of 22 August 1864 did not name but also only described the ‘emblem of a red cross on a white ground’ it created.

<sup>32</sup> London based firms *Fishburn Hedges* and *European Marketing Specialists* (EMS).

sessions, three additional criteria were added: the name should be memorable, short and unambiguous.

Some 100 proposed names were divided into four categories: names describing the shape, names suggesting protection, names suggesting assistance and names suggesting neutrality. They were considered against the actual design of the proposed additional emblem and reduced to a shortlist of 20. Each of these 20 names was then tested against the ICRC-Federation criteria in English, French, Spanish, Arabic, Russian and Chinese. Eventually, six names emerged from the process, fulfilling all criteria that had been set out: 'red frame', 'red crystal', 'red shield', 'red rectangle', 'red dunant' and 'red emblem'.

The Standing Commission never made a formal decision as to the name. However, an unofficial consensus formed around the name 'red crystal'.<sup>33</sup> The name had undeniable advantages: it is identical in the three statutory languages of the Movement – French, English and Spanish – and in many other languages. In the Movement languages as well as in many others it furthermore has the same initials as the red cross and red crescent. The name 'red crystal' was tested informally at the Federation Secretariat and National Societies and through contacts with the School of Oriental and African Studies in London. Similar testing for any pre-existing and potentially conflicting uses in specific countries was done by general web searches. None of these tests yielded insurmountable negative connotations.<sup>34</sup>

The term 'red crystal' was and is in use by others, although not extensively so. Anticipating its adoption, the ICRC began the process of establishing rights to the name and shape, registering the additional emblem as a trademark and registering relevant web domain names in many countries.

### 3.1.2 *The preparations for the 2000 diplomatic conference*

The substantive provisions of the draft protocol, drafted by the ICRC in consultation with the International Federation and which were incorporated into the Third Protocol unaltered, created the possibility for states like Israel and Eritrea and their National Societies to adopt the additional emblem – thus fulfilling the Movement's requirements for recognition – while retaining the right to use their own emblem in use in certain circumstances, either alone or incorporated in the Red Crystal.<sup>35</sup> On 5 July 2000 the ICRC transmitted the draft protocol to the Swiss Government, acting as the depositary of the Geneva Conventions and their Additional Protocols, which forwarded it to all the States Parties to the Geneva Conventions. By then, the Swiss Government, the ICRC and the Federation had started intensive consultations in preparation for a diplomatic conference, to be held in October 2000, which would examine and adopt the third additional protocol. An informal preparatory conference held in Geneva on 5 and 6 September 2000 brought together representatives of all the States Parties to the Geneva Conventions. Following the conference the Swiss authorities felt confident enough to decide formally to invite the states to take part in the diplomatic conference on the emblem scheduled for 25 October in Geneva.

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<sup>33</sup> In this consensus the following arguments played a role: at a basic level 'crystal' is an approximate description of the symbol's shape, it has no negative associations in any of the important languages, it has connotations of natural beauty and possibly even protection and harmony, it has peaceful, tranquil and neutral associations, it brings to mind ideas of light and translucency, on the positive side, it is perceived as precious and unique, on the negative side, it could be perceived as high value or exclusive in some way.

<sup>34</sup> Various other objections were dealt with. Bugnion (n 3), p. 38, mentions the examples of objections that natural crystals are six-sided and not square and the possible connotations with the *Kristallnacht* (9-10 November 1938) in Nazi-Germany. In Hebrew, however, this pogrom is designated by the word '*Bdolah*', which has no connection with crystals. In English, it is known as the Night of the Broken Glass.

<sup>35</sup> Art 2 and 3 of the Third Protocol. See also paragraph 4 below. For graphical examples see <[www.icrc.org](http://www.icrc.org)>.

But on 28 September 2000, with a comprehensive solution closer than ever, a visit of Ariel Sharon, then leader of the Israeli Likud party, to the Temple Mount in Jerusalem, helped spark the second Palestinian Intifada and ended a period of relative calm in the Middle East.<sup>36</sup> On 12 October 2000 Switzerland made it public that the situation in the Middle East had degenerated to the point that the conditions required for the adoption of the third additional protocol no longer prevailed and decided to postpone the Diplomatic Conference.<sup>37</sup> The draft protocol, which had by then received the tentative approval of government representatives in Geneva was circulated to all governments and National Societies at the same time, as a basis for debate when the diplomatic conference was convened.<sup>38</sup> It was widely regarded as a compromise which met the needs of both governments and the Movement and which was virtually ready for adoption.<sup>39</sup> However, member states of the League of Arab States (hereinafter, Arab League) and of the Organisation of the Islamic Conference (hereinafter, OIC)<sup>40</sup> requested a suspension of negotiations on the adoption of a third protocol for as long as clashes continued in the Middle East. As a consequence, the diplomatic process was *de facto* suspended for four years.<sup>41</sup>

### 3.1.3 *The years 2000 - 2005*

Although Switzerland continued with consultations on prospects for reconvening the diplomatic conference, it was quickly clear that this would not be possible while the political situation in the Middle East stood in the way of majority support for reconvening. In these circumstances, the ICRC and the Federation took the view that the draft Protocol circulated on 12 October 2000 could not be amended as its transmission to governments had effectively placed it in the hands of States. It was, however, clear from consultations that there were no significant arguments about any of its provisions, and it grew in stature as the document likely to become the Protocol once the situation made it possible to convene the Conference. This view was consolidated by the decisions of the Movement's statutory meetings at which resolutions were adopted which made it clear that the language on the table was the text which the Movement expected to see adopted. The resolutions consistently referred to the diplomatic conference as one which would be convened 'as soon as circumstances permit'.<sup>42</sup> This situation was the basis for the decision by the Standing Commission of the Red Cross and Red Crescent to appoint a Special Representative on the Emblem. after the postponement of the conference in 2001 and to constitute a working group with National Society representatives to provide advice on the subject to the Standing Commission.<sup>43</sup>

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<sup>36</sup> *The road to war?*, The Economist, Oct 5th 2000.

<sup>37</sup> *Diplomatic conference on additional emblem postponed*, ICRC Emblem Update 5, 13 October 2000.

<sup>38</sup> This draft was dated 12 October 2000.

<sup>39</sup> Letter of the Presidents of the Federation, Standing Commission and ICRC to National Societies, 11 August 2005.

<sup>40</sup> In December 2005, the OIC had 57 member states: <[www.oic-oci.org](http://www.oic-oci.org)>.

<sup>41</sup> In the years after 2000 the bombings in Bali, Riyadh, Casablanca and Istanbul, the war in Afghanistan and in Iraq, and the continuing clashes in the occupied territories created a climate which made any resolution of the emblem illusory.

<sup>42</sup> See, for example, Resolution 3 of the Movement Council of Delegates 2001, preambular para. 2 of which reads "*reiterating* the commitment of the International Red Cross and Red Crescent Movement to achieve, with the support of the States Parties to the 1949 Geneva Conventions, a comprehensive and lasting solution to the question of the emblem, on the basis of the proposed draft Third Protocol Additional to the Geneva Conventions, once it is adopted, as soon as circumstances permit".

<sup>43</sup> When the Movement Council of Delegates considered the issues in 2003, it was clear that improvement of the situation in the Middle East would be followed fairly quickly by the diplomatic conference and the other steps necessary for MDA to become a member of the Movement. With this in mind, the Council of Delegates in 2003 adopted a resolution (No. 7) on the Strategy of the Movement which, for the first time, made it clear that it saw

### 3.2 The diplomatic conference of 2005

In January and February 2005, the newly elected Palestinian leader, Mahmoud Abbas, and Israel's then Prime Minister, Ariel Sharon, agreed a ceasefire and pledged to end violence after more than four years of Intifada. The prospect of peace in the Middle East prompted the Movement and the US State Department via the Ambassador in Berne to request that Switzerland resume the process of diplomatic consultation with a view to adopting a third protocol.<sup>44</sup>

On 30 March 2005 the Swiss Federal Council appointed an ambassador on special mission, Didier Pfirter, to hold consultations on convening the Diplomatic Conference on the emblem. The Special Ambassador carried out extensive consultations both at the permanent missions of many states in Geneva and in the capitals of the countries directly concerned, particularly Egypt, Israel, Syria, Saudi Arabia, Iran, the United States of America and the Palestinian Authority. In parallel, the ICRC, the Federation and the Standing Commission held similar consultations, drawing attention to the importance that the Movement placed on finding a solution to this issue. The outcome of all consultations revealed broad agreement as to the substance of the draft protocol, also among the majority of the member states of the OIC and the Arab League. As would become clear, however, during the informal consultations, many member states of the OIC and the Arab League were strongly convinced that the time was not yet ripe for the new protocol.<sup>45</sup>

#### 3.2.1 *Informal consultations (12-13 September 2005)*

On 12 and 13 September 2005, Switzerland nevertheless opened informal consultations in which all States Parties to the Geneva Conventions were invited to take part. Of the 123 states present, 92 made a statement. Many expressed their hope that Switzerland would convene the diplomatic conference as soon as possible, and that the draft Third Protocol would be adopted by consensus without modification.<sup>46</sup> The member states of the Arab League and the OIC repeated their position that the time was not yet ripe for holding the Conference, that certain problems in territories occupied by Israel still needed to be resolved beforehand and that premature adoption of the additional protocol could slow down redress of these concerns.<sup>47</sup> This position was separately confirmed by a number of representatives of OIC members, including Syria and Palestine. The latter made the following remarks:

‘In our view a main obstacle to convening a Diplomatic Conference lies in the fact that [MDA] is in breach of the principles of the Movement. The principle of independence ... is violated due to the interconnection between the Israeli national society and the Israeli military and government

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the Strategy as also applying to National Societies awaiting membership. From that time on, it was possible for MDA to be considered as part of the ‘Movement family’, even if not yet a formal member.

<sup>44</sup> Standing Commission of the Red Cross and Red Crescent, *Report on the Emblem* (September 2005), p. 5.

<sup>45</sup> Id. The reason given by the OIC was: “the situation prevailing in the Occupied Palestinian Territory, including East Jerusalem, and the grave violations of the international humanitarian law that continue to be perpetrated by Israel, including the construction of the Wall and the continued Israeli settlement activities”; this position was formulated by a resolution (5/31) adopted by the OIC’s foreign ministers at a summit in Sana’a, Yemen, on 30 June 2005. The position is thoroughly political in character, raising no issues as to the substance of the draft protocol, but mentioning actions attributed to the Israeli government as impediments for the adoption of the additional emblem.

<sup>46</sup> Among the supporters were the European and (Latin) American states, Israel, Russia, Brazil and India; China was also supportive, stressing however the importance of further consultations.

<sup>47</sup> Statement of the Pakistan Permanent Representative on behalf of the OIC (12 September 2005). The OIC position received support of South Africa, chair of the movement of non-Aligned states <[www.nam.gov.za](http://www.nam.gov.za)>.

representing a regime of occupation. [MDA] operates in the [occupied territories], including East Jerusalem ... which is outside its geographical jurisdiction and within the territory of another national society namely the Palestinian Red Crescent Society. The same applies to the Israeli national society operations in the Occupied Syrian Golan... In this respect, Palestine wishes to emphasize that, according to the principles of the Movement, each national society works within its national territory and has to respect other national societies' sovereignty. A society could work in the territory of another national society upon its consent. That is according to the rule established in 1921.<sup>48</sup>

The intervention summarised a number of practical concerns that were to be addressed in the months after the informal consultations. The 1921 Rules mentioned in the intervention were drawn up by the Tenth International Conference of the Red Cross in 1921. In short, these rules govern the activities of a National Society in the country of another National Society.<sup>49</sup> The 1921 Rules would play an important role in the negotiations that led to an Agreement between MDA and the Palestinian Red Crescent Society (hereinafter, PRCs) of 28 November 2005, supplementing certain substantive provisions of the Third Protocol.<sup>50</sup>

The consultations concluded with the announcement that Switzerland intended to convene the Diplomatic Conference before the end of 2005, but that it would continue its consultations with a view to working out solutions to the two problems that the discussions had shown to be significant. These issues were the territorial usage of the emblem, and the geographical scope of the operational activities and of the competences of the National Societies. Though not explicitly mentioned in the concluding remarks, they obviously referred to the issues raised by the OIC regarding the activities of MDA in Palestinian territory and in Syrian territory occupied by Israel.<sup>51</sup>

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<sup>48</sup> Palestine intervention by Mohammed Abu-Koash, Ambassador of Palestine to the UN (12 September 2005).

<sup>49</sup> Resolution XI of the 10<sup>th</sup> International Conference (1921). The rules had already been discussed in the drafting process of the third protocol in 2000. Their role in the negotiating process was the result of intensive informal consultations between the permanent representatives concerned and representatives of the ICRC and the Federation. Paragraph 1 of the rules reads:

*1. No Red Cross Society shall set up a Section, Delegation or Committee or Organization, or have any activity in a foreign country without the consent of the Central Committee of the National Society of that country and of its own Central Committee, especially as far as the use of the name and emblem of the Red Cross is concerned.*

*Central Committees are requested to give such approval generously when it is clear that the foreign Section is working exclusively on behalf of its own countrymen. In case of disagreement, the Central Committees may refer the question to the supreme authority of the International Red Cross.*

*It goes without saying that foreign Sections should in the same way as the National Red Cross, respect the legislation and administrative measures of the country in which they are working, and operate always in agreement with the National Red Cross.*

*Where it is desired to set up foreign Sections in countries which have no National Red Cross or Red Crescent, prior approval of the International Committee of the Red Cross must be obtained. Such Sections, once constituted, are invited, in the highest interest of the Red Cross, to encourage, by their example and influence, the formation of a national Society at the earliest date.*

(Handbook of the International Red Cross and Red Crescent Movement (13<sup>th</sup> ed. ICRC, Geneva, 1994), pp. 729-730).

<sup>50</sup> The Third Protocol contains no explicit language as to activities carried out by a National Society under its own emblem in the territory of a National Society using another emblem. It is generally accepted that the Movement's instruments permit the National Society of an occupying country to carry out operational activities within occupied territories, but – until the Third Protocol entered into force – only under the conditions contained in Art. 63 of the Fourth Geneva Convention and the 1921 Rules (*Legal analysis on convention, statutory and Movement policy elements on the field of activities of National Societies in a situation of occupation*, interpretative note, ICRC and Federation, September 2005).

<sup>51</sup> Closing statement by the Chair (unofficial translation of the French original), 13 September 2005. Informally, this position of the chair was criticized as giving too much prominence to these issues, at the cost of the humanitarian aspects of the process. Critical articles also appeared in the Israeli press, see e.g. *Muslim*

### 3.2.2 September – December 2005

The outcome of the informal consultations set the stage for intense diplomatic activity by many states involved, including the United States, Israel, Australia, Arab states and the EU, both in Geneva and in many capitals around the globe. High level government representatives took part, including US Secretary of State Condoleezza Rice, and the Swiss foreign minister, Micheline Calmy-Rey. The latter held consultations at the political level at the UN General Assembly in New York, and in the United States, Europe and in the Middle East, where they met with heads of state and ministers of, amongst others, Palestine, Lebanon, Israel and Egypt. Simultaneously, the Special Ambassador, the ICRC and the Federation conducted intensive negotiations with National Societies and permanent representatives in Geneva and in the Middle East. Of these negotiations, those with the representatives of the National Societies and governments of the Palestinian Authority and Syria directly influenced the course and outcome of the diplomatic conference.

### 3.2.3 Magen David Adom and the Palestinian Red Crescent Society

On 27 September Noam Yifrach, chairman of the executive committee of MDA, signed a Declaration on behalf of MDA in the presence of the Presidents of the ICRC, Federation and the Standing Commission.<sup>52</sup> In the Declaration, MDA committed itself to working within the rules and principles of the Geneva Conventions and the Movement and expressed its intent to conclude agreements on operational cooperation with the Palestinian and Syrian Red Crescent Societies. This politically significant document served as a response to the issues raised regarding Israel and the occupied territories by the representatives of the OIC and Arab League during the informal consultations of 12 and 13 September. The Declaration was well received by the Palestinian permanent representative and the PRCS, though in his reaction Younis Al-Khatib, president of the PRCS, emphasised the need for implementation of the declaration ‘on the ground’ in the Occupied Territories, including East Jerusalem.<sup>53</sup>

After the Swiss decision of 6 November to convene the diplomatic conference on 5 December, talks between PRCS and MDA resumed, facilitated by the Swiss government, the ICRC and the Federation. These negotiations resulted in a Memorandum of Understanding (hereinafter, MoU) between MDA and the Palestine Red Crescent, which was initialled on 16 November, followed by an Agreement on Operational Arrangements between the two societies, signed at a formal ceremony hosted by the Swiss minister for foreign affairs in Geneva on 28 November.<sup>54</sup> The agreement clarified the reciprocal relations between and competences of the two societies, set out a number of practical issues on which the societies would cooperate and paved the way for the simultaneous admission to membership of both Societies in the Movement.

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*intolerance*, Jerusalem Post, Wednesday 14 September 2005. Others held that Switzerland could not but give weight to the broadly supported political OIC standpoint. Furthermore, both Switzerland and the Movement had to count with the negative and unwanted perception, informally and publicly voiced by governments, media and organisations in all parts of the world, that they were acting under pressure (from the United States and Israel) to convene the conference. This would clearly have hardened the position of those opposing the adoption.

<sup>52</sup> Magen David Adom in Israel, Declaration of 27<sup>th</sup> September 2005.

<sup>53</sup> Cf. Letter of Younis Al Khatib (PRCS) to Noam Yifrach (MDA) of 9 October 2005.

<sup>54</sup> Memorandum of Understanding between Magen David Adom in Israel and Palestine Red Crescent Society, initialled in Seoul on 16 November 2005 and Agreement on Operational Arrangements, signed in Geneva on 28 November 2005.

The MoU and subsequent Agreement sparked positive reactions, both in the media and at the diplomatic level. Newspapers spoke of an ‘unprecedented agreement’<sup>55</sup> and, shortly after the conclusion of the MoU, the Palestinian Authority issued a very positive information note on the cooperation between the two national societies to the OIC, the movement of non-aligned states and the Swiss government.<sup>56</sup>

### 3.2.4 *Magen David Adom and the Syrian Red Crescent*

After long diplomatic preparations, on 5 October representatives of the Syrian Foreign Ministry and the Syrian Arab Red Crescent Society (hereinafter, SARCS) met in Damascus with representatives of the Federation, the ICRC and the Swiss Government. At the meeting it was agreed that all parties were in favour of working towards an agreement on practical cooperation between SARCS and MDA, based on the MDA Declaration of 27 September. Though SARCS undertook to prepare a list of issues to be discussed with MDA, in the weeks to follow no such list was communicated and no further substantial consultations took place.<sup>57</sup>

This changed shortly after the signing of the Agreement between MDA and PRCS on 28 November. Syria, through its permanent representative in Geneva, had reacted very sceptically to the MoU between MDA and PRCS of 16 November, emphasising that, regarding the situation in the occupied territories, ‘serious concerns raised by the Syrian side...[had remained] unaddressed’.<sup>58</sup> On 30 November, however, the Syrian representative in Geneva expressed and explained the Syrian wish for an agreement between SARCS and MDA, based on the Agreement between MDA and PRCS, regarding admitting and facilitating activities of SARCS in the Golan Heights, occupied by Israel since June 1967. With the start of the Diplomatic Conference only days away, talks were reopened between the Swiss government, the ICRC and the Federation, MDA and the Syrian Arab Red Crescent Society and the Syrian permanent representative, the latter two in close cooperation with the Syrian government. These negotiations, which went on until the last day of the diplomatic conference, were delayed and impeded by the very short term on which they had to be organised, by the initial difficulties of getting the delegations together and by the insistence of the Syrian delegations not to establish direct contact with MDA, but to conduct the negotiations in the form of ‘proximity talks’ with the delegations in separate rooms, using the good offices of the Swiss and various other delegations.

### 3.2.5 *The Diplomatic Conference (5-8 December 2005)*<sup>59</sup>

The Diplomatic Conference was convened by Switzerland and held at the International Conference Centre in Geneva from 5 to 8 December 2005. Though the OIC or the Arab League had yet to openly declare anything regarding their position on the toilsome and sometimes tense negotiations with Syria,<sup>60</sup> both the Swiss minister of foreign affairs and the

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<sup>55</sup> Quote in the usually critical Jerusalem Post, *MDA to sign deal with Palestinian Red Crescent*, Jerusalem Post, 28 November 2005.

<sup>56</sup> *Information Note regarding the Diplomatic Conference for the Third Protocol Additional*, Ramallah, 20 November 2005.

<sup>57</sup> At the time Syria was under great political pressure for its alleged role in the assassination of Rafiq al-Hariri in February 2005. See e.g. *Syria faces crisis over Hariri report*, BBC News, 21 October 2005, <[news.bbc.co.uk/2/hi/middle\\_east/4364582.stm](http://news.bbc.co.uk/2/hi/middle_east/4364582.stm)>.

<sup>58</sup> Permanent Mission of the Syrian Arab Republic, *Position Paper* (23 November 2005).

<sup>59</sup> An important source was: *Déroulement de la Conférence Diplomatique pour l'adoption d'un 3<sup>ème</sup> Protocole Additionnel aux Conventions de Genève de 1949* (unofficial French transcript by the Movement delegations).

<sup>60</sup> Diplomats were also awaiting the outcome of an OIC Heads of State summit that was to be held in Mecca on 6 December, which did not noticeably change the OIC's points of view.

Special Ambassador had received messages from representatives of various OIC states that if the relations between MDA and PRCS were solved to the satisfaction of the Palestinian representatives, they would not oppose the adoption of the protocol.<sup>61</sup>

In her speech at the opening of the conference, Mrs. Calmy-Rey referred to the agreement signed on 28 November 2005 between PRCS and MDA, and mentioned the shared expectation that the agreement would facilitate adoption of the draft protocol and admission of the two societies into the Movement. She expressed the hope that the Conference would be able to adopt the protocol by consensus and thereby to continue the tradition that has characterised the actions of the international community in matters of codifying international humanitarian law.<sup>62</sup> In his opening address, the president of the ICRC, Jakob Kellenberger, made an appeal to the states present to create a new instrument for strengthening the protection of war victims and to finally achieve the universality to which the Movement aspires.<sup>63</sup>

In an intervention on behalf of the OIC, Ambassador Masood Khan of Pakistan, chair of the OIC humanitarian group, held that the time was not yet ripe to settle this question, signalling the opposition to adopting the protocol and the fact that to overcome this opposition, an agreement or, by way of compromise, an understanding in the form of an exchange of letters between the Syrian Red Crescent and MDA must be reached. The representative also referred to the draft amendments proposed and circulated by Yemen and Pakistan with the support of the OIC and Arab League in the week before the conference.<sup>64</sup>

Over 50 delegations of the 144 present and allowed to vote took part in the general debate. The great majority of these delegations underlined the need to reach a comprehensive solution to the issue of the emblem and gave their support to the draft Third Protocol.<sup>65</sup> Most of the points raised by the opponents of the protocol concerned the situation in the Middle East and, in particular, in the Golan Heights.

Towards the end of the first day's plenary session, Younis Al-Khatib, president of the PRCS, in a remarkably outspoken intervention, emphasised the historical significance of his organisation's agreement with MDA and its contribution to the joint humanitarian mission of both National Societies, expressing the hope it would make a contribution to a lasting peace.

The general debate was adjourned by the Chair immediately after its opening on the morning of 6 December. It was not reopened. Throughout the day, confidential negotiations between the Syrian Red Crescent and MDA under the auspices of the Swiss government, assisted by ICRC and Federation, continued in adjoining conference rooms. These negotiations went on until 4 a.m. the following day, without yielding a result.

The patience of the government delegations was again put to a severe test on Wednesday 7 December, the third day of the conference. The plenary debate was adjourned several times on behalf of the negotiations which, as became clear in the afternoon, would remain unsuccessful. When the plenary debate resumed at the end of the afternoon, the Ambassador of Chile, in the name of a small group of delegations, submitted a proposal to adopt the Third Protocol without modification and at the same time to adopt paragraphs to be inserted in the Final Act of the Diplomatic Conference recalling the agreement signed on 28 November between MDA and the Palestine Red Crescent, and calling for a similar agreement between

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<sup>61</sup> Quote by Didier Pfirter, the Swiss Special Ambassador, cited by press agency SwissInfo: *New Red Cross emblem leaves bitter taste* (8 December 2005).

<sup>62</sup> Reproduced in Bugnion (n 3) pp 63-68.

<sup>63</sup> Id., pp 69-70.

<sup>64</sup> In order to avoid plenary discussion on the substance of the amendments, the Chair of the conference established a committee to deal with the amendments, chaired by the ambassador of Norway.

<sup>65</sup> 34 states spoke in favour of the protocol, 8 emphasised the necessity of consensus, 7 OIC member states and Cuba spoke against. See for details on the conference the website of the Swiss Department of Foreign Affairs: <www.eda.admin.ch>.

the Syrian Arab Red Crescent and MDA. Under this proposal, the draft protocol and the provisions to be inserted into the Final Act would have been adopted in one single operation.

The debate was adjourned to enable delegates, especially the OIC member states who convened for several hours in a separate conference room, to study the Chilean proposal. After resumption a long and chaotic debate took place between in effect the Chair and the representative of Pakistan on the status of the Chilean proposal and the way to proceed under the rules of procedure of the conference. This debate was adjourned several times by the Chair for consultations with his staff and with the legal advisers of the Swiss delegation to the conference. The Chilean solution was not accepted and it was apparent that there was no possibility of arriving at a consensus. Voting was therefore unavoidable. A first vote was called on the amendments of the Arab League and OIC. The OIC were not against the Conference reaching a decision on the entire set of these amendments all at once.<sup>66</sup> Put to a roll-call vote, these amendments were rejected by 72 votes to 35 with 29 abstentions. The Conference then proceeded to adopt the Third Protocol by 98 votes to 27 with 10 abstentions, amply meeting the requirement for a two-thirds majority.<sup>67</sup>

In the explanations of vote that followed, several delegations expressed regret that the Third Protocol had been adopted by vote and that the international community, for the first time, had split over a treaty of international humanitarian law. Several of the delegations that had voted against adopting the protocol were keen to emphasise, however, that their opposition was not aimed at the draft protocol but had to do with the timing and with the situation in the Middle East. Others stressed that although they had voted against the adoption of the protocol their countries would respect the new distinctive emblem if it was adopted by other countries.

Quite unusually, the conference did not produce or discuss the text of its Final Act.<sup>68</sup> Despite the late hour, on Thursday 8 December 2005 at 2.30 am seven heads of delegation<sup>69</sup> signed the Third Protocol Additional to the Geneva Conventions during the brief signing ceremony that followed the closing of the Diplomatic Conference.<sup>70</sup>

#### 4. SUBSTANTIVE ISSUES

Among the main substantive issues that arose during the adoption of the Third Protocol were questions regarding the conditions for use of the Red Crystal, both by states and by National Societies once the Third Protocol is in force. In the following part some of these legal issues will be briefly discussed.<sup>71</sup>

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<sup>66</sup> *Introduction by Ambassador Masood Khan of the Amendments proposed by Pakistan and Yemen*, Geneva, 7 December 2005. In a comment, the Syrian representative implicitly criticized Switzerland for its handling of the conference, calling it a wasted opportunity and suggesting that those states that would vote in favour of the protocol were “burying International Humanitarian Law”.

<sup>67</sup> The Arab League member states present voted against, with the exception of two, that abstained: Jordan and Bahrain; of the non-Arabic OIC member states a number abstained or voted in favour; details on the voting should be available on <[www.eda.admin.ch](http://www.eda.admin.ch)>.

<sup>68</sup> It was ultimately issued several months later, in March 2006, after discussions conducted by Switzerland with all delegations with a significant stake in the outcome.

<sup>69</sup> Belgium, Burundi, Greece, Israel, Peru, Timor-Leste, United States.

<sup>70</sup> A few hours later on 8 December 2005, a news article on the adoption of the Third Protocol was published on the website of the Israel Ministry of Foreign Affairs, showing a picture of the Red Shield of David incorporated in the Red Crystal <[www.mfa.gov.il](http://www.mfa.gov.il)>.

<sup>71</sup> Only few documents on the drafting of the Third Protocol are publicly available and there is yet little practice of states and components of the movement as to the use of the red crystal. This brief analysis of certain legal aspects is provisory and far from comprehensive. Of use in preparing it was – apart from the author’s own notes – a non-paper prepared by the Movement in October and November 2005, entitled *Interpretative note*

## 4.1 Introduction

The Third Protocol is not an independent document, but a mere additional instrument linked to the four 1949 Geneva Conventions and the two 1977 Additional Protocols. It supplements their substantive rules and implementation mechanisms and is governed by their provisions which are relevant and which it has not amended.<sup>72</sup> The text of the Third Protocol consists of ten preambular paragraphs and 17 articles. It is not divided into parts, sections or chapters. The first seven articles deal with the substance, while the last ten are devoted to general so-called ‘final provisions’. The latter are largely inspired by and sometimes exact copies of the text of either the Conventions or the Protocols.

The subject matter of the Third Protocol is relatively restricted compared with that of the two 1977 Additional Protocols: it only complements the Geneva Conventions by permitting the use of an additional distinctive emblem, the Red Crystal. This emblem is not intended to replace the existing emblems recognised by the Geneva Conventions of 1949, but to offer the States Parties – and certain others – the possibility of using it subject to the conditions laid down in the substantive provisions.

Regarding that use, preambular paragraph 7 of the Third Protocol recalls the important provision of Article 44 of the First 1949 Geneva Convention, that the emblems fulfil two essentially different functions. The first – its protective use – is the visible manifestation of the protection accorded by the Geneva Conventions to medical personnel, units or transports of the armed forces as well as to other duly authorised organisations, objects and persons. The second – its indicative use – shows that a person or object carrying the emblem has a link with the International Red Cross and Red Crescent Movement.<sup>73</sup> The Red Crystal is to be used under exactly the same conditions for protective and indicative purposes.

## 4.2 The use of the additional emblem by states

Every State Party to the Geneva Conventions is entirely free to choose which emblem it wants to use and be used within the territories under its jurisdiction.<sup>74</sup> This choice will normally be enshrined in and subject to national law. National legislation, together with the relevant provisions of the Geneva Conventions and the Additional Protocols, govern the use of the emblem by a state. Article 2 of the Third Protocol adds certain provisions regarding the Red Crystal to the existing international law.<sup>75</sup>

The first paragraph of Article 2 institutes the new distinctive emblem alongside those already recognised by the 1949 Geneva Conventions. The second sentence, stating that all emblems shall enjoy equal status, alters the common provision of Article 38 and 41 of the

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*concerning the draft Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III).*

<sup>72</sup> See preambular paras. 1 and 2 and Art. 1(2) of the Third Protocol. Many provisions of the Geneva Conventions and Additional Protocols refer to the emblems, as do Art. 23(f) of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land of 1907. See also the references in Bugnion (n 3).

<sup>73</sup> Commentary to Art. 44 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (ICRC, Geneva 1952) p. 325. For rules on the indicative use, see: *Regulations on the use of the Emblem of the Red Cross or the Red Crescent by the National Societies* (hereinafter, Emblem Regulations).

<sup>74</sup> This follows from inter alia the Geneva Conventions, e.g. Art. 38-44 and 53 GC I, and from the relevant Movement regulations, e.g. Art. 2 of the Emblem Regulations (n 73). See also the example of Kazakhstan (n 20).

<sup>75</sup> See also preambular paras. 3 and 9, recognizing both the right of states to use and continue to use the emblems of the red cross and red crescent they are already using and the difficulties that certain States and National Societies may have with the use of these emblems.

first and second Geneva Conventions respectively. These articles implied a certain hierarchy between the recognised emblems, considering the red cross to be the rule and the other emblems exceptions thereto. State practice has however gradually led to the emblems being placed *de facto* on an equal footing. Article 2(1) thus codifies a development of the law. This is to some extent confirmed by paragraph 3.

Article 2(2) provides the official description of the form chosen for the additional emblem, referring to the technical annex showing a model to guide states wishing to use the new distinctive emblem.

Paragraph 4 allows the medical services and religious personnel of the armed forces of states to make temporary use of any emblem recognised in the Geneva Conventions where this may enhance protection. This provision fills a gap in treaty law, which did not clarify whether states could use an emblem other than that which they normally use (for example the red cross instead of the red crescent or the red crystal instead of the red cross). The flexible use provided for in this article further consolidates the equal status of the existing emblems.

#### 4.3 The use of the additional emblem by National Societies

The complex Article 3 of the Third Protocol covers the additional rules on indicative use of the additional emblem, which in effect covers most of the use National Societies make of the emblems. As mentioned above, however, the choice and use of an emblem by a National Society is in the first place determined by the choice of the state in which it operates. In effect a National Society, which in order to be recognised by the Movement has to be recognised by its state,<sup>76</sup> will always use the emblem chosen and used by the state, with the consent of the state and subject to the relevant provisions of national law.<sup>77</sup>

According to this main rule, Paragraph 1 of Article 3 applies to the National Societies of those States Parties which decide to use the red crystal. Paragraph 1 offers two possibilities regarding the indicative use to National Societies that, subject to the choice of their state, will use the red crystal. First, according to subparagraph a), National Societies may choose to incorporate within the red crystal one or a combination of the existing emblems recognised by the Geneva Conventions. Such incorporation is not subject to particular conditions. This provision was written to address the problems of countries like Eritrea, wishing to use both the red cross and red crescent. Secondly, subparagraph b) allows National Societies to incorporate ‘another’ emblem in the red crystal, provided that it meets two cumulative conditions: it must already have been used by a State Party and it must have been the subject of a communication (most likely a reservation), through the depositary, to the parties to the Geneva Conventions and to the ICRC prior to the adoption of the Third Protocol. The only emblem that in effect meets both these conditions is the red shield of David used by MDA.<sup>78</sup>

Paragraph 2 of Article 3 allows a National Society which has decided to incorporate one or more of the emblems defined in paragraph 1 to use the name of the emblem(s) incorporated, and to display the(se) emblem(s) without the Red Crystal. This should however be in conformity with national legislation and only within the National Society’s national territory. Provided all conditions of paragraph 1 and 2 are met, this provision gives MDA the right to use only the name MDA and display only the red shield of David without having to place it

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<sup>76</sup> Art 4(3) Statutes (n 7).

<sup>77</sup> As a member of the Movement, the use – but not the choice – of the emblem by a National Society is furthermore governed by its (uniform) statutes and the relevant Movement rules. The Geneva Conventions and the Additional Protocols also contain relevant provisions, see e.g. for situations of occupation Art. 26 of GC I and 63 of GC IV.

<sup>78</sup> See para. 3.1.

within the red crystal – in effect legalising the existing situation.<sup>79</sup> The same would be possible for a National Society that uses both the red cross and red crescent.

No provision is made in the Third Protocol for the use by a National Society of any emblem outside its national territory. While this issue may give rise to a plethora of possible situations, combinations and complications, the main rule for dealing with the matter is recalled in preambular paragraph 8 which mentions the applicable rule of the Movement that National Societies undertaking activities on the territory of another state must ensure that the emblems they intend to use within the framework of such activities may be used in the country where the activity takes place and in the country or countries of transit.<sup>80</sup> This ‘consent rule’ has implications for both the ‘receiving’ state and National Society as well as for the Society bringing assistance. In situations in which consent for the use of the red cross or red crescent may be unlikely or problematic, the use of the red crystal by a society operating abroad may be a solution.

Paragraph 3 of Article 3 allows National Societies of states that have not adopted the Red Crystal as their emblem to use it nevertheless, if under very strict conditions. Only in exceptional circumstances, in accordance with national legislation, and to facilitate their work, may a National Society make temporary use of the Red Crystal. The paragraph is the counterpart of Article 2(4) concerning protective use by states.

Paragraph 4 of Article 3 contains a saving clause, stipulating that the legal status of any particular emblem, incorporated in accordance with Article 3, will not be affected. This provision makes it plain that emblems within the meaning of paragraph 1 b) – like for example the Red Shield of David – shall not acquire any broader legal status on this account than conferred on them by the Third Protocol.

Finally, as was illustrated by the consultations regarding the adoption of the Third Protocol, it is likely that the meaning ‘national territory’ in Article 3 in practice may be interpreted in conformity with the meaning of the term in international law.<sup>81</sup>

#### **4.4 The use of the additional emblem by others**

##### *4.4.1 The international components of the Movement*

Preambular paragraph 10 specifies that the international components of the Movement will change neither their names nor their respective signs. Article 4, however, authorises the ICRC and the international Federation as international components of the Movement to use the Red Crystal in exceptional circumstances and to facilitate their work.

Though the adoption of the Third Protocol required the modification of the Statutes of the Movement in order to allow National Societies to use the red crystal, modifications regarding permanent use and name will be limited to National Societies. The international components of the Movement differ in their attitude towards the use of the emblems. While the Federation already uses both the red cross and red crescent in its logo,<sup>82</sup> the ICRC is quite reluctant to operate under any other sign than the ICRC logo, carrying only the red cross. Practice will have to show under what circumstances these organisations will use the crystal.

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<sup>79</sup> For examples see <[www.icrc.org](http://www.icrc.org)>. Some parts of Israel’s ‘national territory’ strongly being contested by many states, Art. 3 was one of the substantive provisions that sparked the opposition against the adoption of the Third Protocol.

<sup>80</sup> See the 1921 Rules (n 49).

<sup>81</sup> See e.g. para. 6 of the Declaration made by MDA on 27 September 2005 (n 52).

<sup>82</sup> On this logo: <[www.ifrc.org](http://www.ifrc.org)>.

#### 4.4.2 Missions under United Nations auspices

Article 5 allows the medical services and religious personnel participating in operations under the auspices of the United Nations to use, with the agreement of participating states, the red cross, red crescent or red crystal. This provision is justified by the growing number and diversification of activities conducted under the auspices of the UN. Article 5 states that the UN (with the agreement of the participating states in the multinational force) may choose which distinctive emblem is to be used by the force to identify its medical services. Though the right of UN personnel to use and the duty to respect the emblems are undisputed,<sup>83</sup> there is no clarity about the circumstances in which the emblems may be used by the UN and whether previous permission of the Movement will be required. Often UN missions are not perceived as neutral or impartial, which may seriously endanger the protective value of and respect for the emblem. Partly for that reason, this Article's field of application is in any case likely to be restricted to forces acting under the auspices of the United Nations. References in a previous draft of the protocol to missions led by or under the auspices of other international or regional organisations were deleted.

#### 4.5 Entry into force

Article 11 repeats the texts of Article 95 of Additional Protocol I and Article 23 of Additional Protocol II. Paragraph 1 states that the Third Protocol shall enter into force six months after two instruments of ratification or accession have been deposited. Paragraph 2 states that for each state ratifying or acceding to this Protocol after it has entered into force, it shall enter into force six months after its deposit of an instrument of ratification or accession. Various states objected against a previous version of the draft, which recommended the entry into force the day after the deposit of the instrument of ratification or accession. Therefore the 'traditional' interval of six months has been retained.

### 5. IMPLEMENTATION

Implementation will be a key area of future development and acceptance of the red crystal. In this process, both States Parties to the Third Protocol and the international and national components of the Movement will play a role.

#### 5.1 States

The Third Protocol urges states to ratify the Third Protocol as soon as possible but contains only very general provisions regarding prevention and repression of misuse and dissemination of the emblem by the States Parties.<sup>84</sup> Article 7 obliges states to disseminate this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that this instrument may become known to the armed forces and to the civilian population. The obligations of states in this respect are identical to those for the existing

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<sup>83</sup> See e.g. the 1999 Secretary-General's Bulletin, *Observance by United Nations forces of international humanitarian law* (UN Doc ST/SGB/1999/13), section 9.7: "The United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems. These emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited."

<sup>84</sup> Arts. 6 and 7 Third Protocol.

emblems<sup>85</sup> and it is to be expected that states will at least in part rely on their National Societies for fulfilling their obligations.

On 14 July 2006 Switzerland deposited its instrument of ratification of the Third Protocol. It was the second ratification, Norway having lodged its on 13 June. According to Article 11 of the Third Protocol, it will therefore enter into force six months after the Swiss ratification, on 14 January 2007

## 5.2 The Movement

The adoption of the Third Protocol was a decisive step towards a comprehensive and lasting solution to the question of the emblem, but did not by itself constitute such a solution. The final step enabled National Societies deciding to adopt the red crystal to be admitted into the Movement and consisted of a revision of the Statutes of the International Red Cross and Red Crescent Movement taking into account the adoption of the Third Protocol. The Standing Commission gave the ICRC and the Federation the responsibility of organising in June 2006 the 29th International Conference of the Red Cross and Red Crescent. The purpose of the International Conference was: (1) to consider and adopt amendments to the Statutes of the International Red Cross and Red Crescent Movement consequent upon the adoption on 8 December 2005 of Protocol III additional to the Geneva Conventions; (2) to consider and decide upon the proposed name of 'red crystal' for the distinctive emblem of the Third Protocol; and (3) to create a framework for the recognition and admission of the Palestine Red Cross Society.<sup>86</sup>

The 29th International Conference of the Red Cross and Red Crescent held in Geneva in June 2006,<sup>87</sup> was attended by 178 National Societies and 148 States. The conference amended the Statutes of the Movement to incorporate the additional emblem, which was officially given the name 'red crystal'. In addition the conference requested that the Palestine Red Crescent Society (PRCS) be admitted into the Movement. As a consequence, on 22 June 2006 the ICRC recognised PRCS and MDA, and the Federation General Assembly unanimously admitted both to Federation membership.

## 5.3 The rules on the use of the emblems

Another task for the Movement and for legal specialists around the world, will be to clarify the substantive provisions of the Third Protocol, to determine their scope of application and thus to enable their implementation. This is especially true regarding the substantive provisions of the Protocol, the text of which is the product of political compromise rather than of a desire for legal clarity. As the debate on the 1921 Rules and the brief commentary above has shown, there are numerous situations for which the language of the protocol gives no unequivocal solution. Various provisional interpretative notes were used by participants in the diplomatic conference, none of which, however, treated the substantive provisions in a comprehensive way, covering the legal aspects of the Third Protocol and its relation to, for example, the existing provisions of the Geneva Conventions, to existing rules of the Movement or to national laws. It is to be expected that the Movement will produce a commentary to the Third Protocol addressing these issues, but this may take years. In the meantime, National Societies, other humanitarian actors, the military and all others who will

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<sup>85</sup> See Arts. 1(1) and 2(3) Third Protocol.

<sup>86</sup> The framework for admitting MDA will be created by amending the Movement Statutes.

<sup>87</sup> Chaired by Dr. Mohammad Al Hadid, Chairman of the Standing Commission of the Red Cross and Red Crescent.

work with the additional emblem and the Third Protocol will benefit from more clarity as to its provisions.

## 6. CONCLUSION

For almost 60 years, the question of the emblem has threatened the unity of the International Red Cross and Red Crescent Movement and prevented it from achieving full universality. The existing situation was furthermore perceived as excluding states and National Societies from the Movement and negatively affected the perception of the existing emblems, thus diminishing the protection they offer in times of armed conflict and disaster. The adoption of the Third Protocol and the additional emblem of the red crystal was a decisive step towards solving these serious and long-standing problems.

Political issues almost surpassed the humanitarian arguments for the creation of the red crystal. These politics did not concern the substance of the protocol but were directly linked to the factual and political situation in the Middle East. As a consequence, the adoption of the Third Protocol was a long and very complex process, the Third Protocol being the only treaty among the 1949 Geneva Conventions and its Additional Protocols to be adopted by a vote.

It remains to be seen whether and, if so, to what extent, this may negatively affect the universal respect for and protective force of the red crystal. Almost all states have acknowledged their obligations under international humanitarian law and the need to accept and fully respect the emblems recognised by the Geneva Conventions and the Additional Protocols. Developing practice will answer that question.

With the necessary legal mechanisms in place, the red crystal may now be used. In that respect implementation of the Third Protocol remains a key issue in the future of the new emblem. While after 130 years of joint use, the red cross and red crescent are instantly recognised around the globe, the red crystal still has a long way to go. Changing that requires a continuous and joint effort of states, National Societies, the international components of the Movement and others in examining and developing effective methods of implementing and disseminating the additional emblem of the red crystal.