

Cambridge University Press

978-0-521-80899-6 — Customary International Humanitarian Law

Jean-Marie Henckaerts , Louise Doswald-Beck , With contributions by Carolin Alvermann , Knut Dörmann , Baptiste Rolfe
Frontmatter

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INTERNATIONAL COMMITTEE OF THE RED CROSS

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

VOLUME I

RULES

Jean-Marie Henckaerts and Louise Doswald-Beck

With contributions by Carolin Alvermann,

Knut Dörmann and Baptiste Rolle



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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo,
Delhi, Dubai, Tokyo

Cambridge University Press

The Edinburgh Building, Cambridge, CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521005289

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First published 2005

Reprinted with corrections 2009

Fifth printing 2010

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-80899-6 hardback

ISBN 978-0-521-00528-9 paperback

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FOREWORD BY DR. JAKOB KELLENBERGER

President of the International Committee of the Red Cross

The laws of war were born of confrontation between armed forces on the battlefield. Until the mid-nineteenth century, these rules remained customary in nature, recognised because they had existed since time immemorial and because they corresponded to the demands of civilisation. All civilisations have developed rules aimed at minimising violence – even this institutionalised form of violence that we call war – since limiting violence is the very essence of civilisation.

By making international law a matter to be agreed between sovereigns and by basing it on State practice and consent, Grotius and the other founding fathers of public international law paved the way for that law to assume universal dimensions, applicable both in peacetime and in wartime and able to transcend cultures and civilizations. However, it was the nineteenth-century visionary Henry Dunant who was the true pioneer of contemporary international humanitarian law. In calling for “some international principle, sanctioned by a Convention and inviolate in character” to protect the wounded and all those trying to help them, Dunant took humanitarian law a decisive step forward. By instigating the adoption, in 1864, of the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Dunant and the other founders of the International Committee of the Red Cross laid the cornerstone of treaty-based international humanitarian law.

This treaty was revised in 1906, and again in 1929 and 1949. New conventions protecting hospital ships, prisoners of war and civilians were also adopted. The result is the four Geneva Conventions of 1949, which constitute the foundation of international humanitarian law in force today. Acceptance by the States of these Conventions demonstrated that it was possible to adopt, in peacetime, rules to attenuate the horrors of war and protect those affected by it.

Governments also adopted a series of treaties governing the conduct of hostilities: the Declaration of St Petersburg of 1868, the Hague Conventions of 1899 and 1907, and the Geneva Protocol of 1925, which bans the use of chemical and bacteriological weapons.

These two normative currents merged in 1977 with the adoption of the two Protocols additional to the 1949 Geneva Conventions, which brought up to date both the rules governing the conduct of hostilities and those protecting war victims.

More recently, other important conventions were added to this already long list of treaties, in particular the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Landmines, the 1998 Statute of the International Criminal Court, the 1999 Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 2000 Optional Protocol on the Involvement of Children in Armed Conflict.

This remarkable progress in codifying international humanitarian law should not, however, cause us to ignore customary humanitarian law. There are three reasons why this body of law remains extremely important.

First, while the Geneva Conventions enjoy universal adherence today, this is not yet the case for other major treaties, including the Additional Protocols. These treaties apply only between or within States that have ratified them. Rules of customary international humanitarian law on the other hand, sometimes referred to as “general” international law, bind all States and, where relevant, all parties to the conflict, without the need for formal adherence.

Second, international humanitarian law applicable to non-international armed conflict falls short of meeting the protection needs arising from these conflicts. As admitted by the diplomatic conferences that adopted them, Article 3 common to the Geneva Conventions and Protocol II additional to those Conventions represent only the most rudimentary set of rules. State practice goes beyond what those same States have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to *all* armed conflicts, international and non-international.

Last, customary international law can help in the interpretation of treaty law. It is a well-established principle that a treaty must be interpreted in good faith and with due regard for all relevant rules of international law.

With this in mind, one better understands the mandate assigned to the ICRC by the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995), when the organization was asked to:

prepare, with the assistance of experts in international humanitarian law representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.

The ICRC accepted this mandate with gratitude and humility – gratitude because it appreciates the international community’s confidence in it as symbolised by this assignment, and humility since it was fully aware of the difficulty involved in describing the present state of customary international law on the basis of all available sources.

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The ICRC charged two members of its Legal Division with the task of carrying out this study. Under the guidance of a Steering Committee composed of 12 experts of international repute, the ICRC engaged in a large-scale consultation process involving over 100 eminent authorities. Considering this report primarily as a work of scholarship, the ICRC respected the academic freedom both of the report's authors and of the experts consulted, the idea being to capture the clearest possible "photograph" of customary international humanitarian law as it stands today.

The ICRC believes that the study does indeed present an accurate assessment of the current state of customary international humanitarian law. It will therefore duly take the outcome of this study into account in its daily work, while being aware that the formation of customary international law is an ongoing process. The study should also serve as a basis for discussion with respect to the implementation, clarification and development of humanitarian law.

Lastly, the ICRC is pleased that this study has served to emphasise the universality of humanitarian law. All traditions and civilizations have contributed to the development of this law, which is today part of the common heritage of mankind.

The ICRC would like to express its deep gratitude to the experts who gave freely of their time and expertise, to the staff of its Legal Division, and in particular to the authors, who, in bringing this unique project to its conclusion, refused to be discouraged by the enormity of the task.

In presenting this study to the States party to the Geneva Conventions, to National Red Cross and Red Crescent Societies and other humanitarian organisations, to judges and scholars and to other interested parties, the ICRC's sincere hope is that it will clarify the meaning and significance of a number of rules of international humanitarian law and that it will ensure greater protection for war victims.

FOREWORD BY DR. ABDUL G. KOROMA**Judge at the International Court of Justice**

Sadly, it cannot be said that the incidence of armed conflict has become any rarer since the end of the Second World War. Rather, a host of conflicts across the world, both international and non-international, have highlighted as never before the extent to which civilians have become targets and the growing need to ensure the protection of the wounded, the sick, detainees and the civilian population afforded to them by the rules of international humanitarian law. Opinions vary as to the reason for the increasing number of violations of international humanitarian law. Is it a lack of awareness of the rules on the part of those who should observe them? Is it the inadequacy of the rules even where they are known? Is it weak mechanisms for enforcing the rules? Or is it sheer disregard for the rules? To some extent, there is truth in each. For international humanitarian law to be more effective, not one but all of these facets of the problem need to be addressed. Clearly, the first step in achieving the goal of universal respect for humanitarian rules must be the articulation of what the rules require; only then can the question of how to improve upon them be considered.

This study of customary international humanitarian law and its role in protecting the victims of war is both timely and important for a number of reasons. The relevant treaty law covers a wide variety of aspects of warfare, but treaty law, by its very nature, is unable to provide a complete picture of the state of the law. While treaties bind those States that have adhered to them, without the existence of customary law, non-parties would be free to act as they wished. In addition, because they are written down, treaty rules are well defined and must be clear as to the standard of conduct they require; but since a treaty is the result of an agreement between the parties, the instruction provided by a treaty rule is only as useful as the degree of genuine agreement achieved. Written rules cannot be vague or open to divergent interpretations. Customary international law, while being notorious for its imprecision, may be no less useful than treaty law, and may in fact actually have certain advantages over it. For example, it is widely accepted that general customary international law binds States that have not persistently and openly dissented in relation to a rule while that rule was in the process of formation. Also, one of the most important bases for the success of a treaty regime is the extent of the political will to achieve the

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purposes of that treaty, and that is as important, if not more so, than the need for the rules to be in written form.

Accordingly, this study, which aims to articulate the existing customary rules on the subject, can only help improve respect for international humanitarian law and offer greater protection to victims of war. Knowledge of the relevant customary law on the part of the various actors involved in its application, dissemination and enforcement, such as military personnel, governmental authorities, courts and tribunals and governmental and non-governmental organisations, is a vital first step towards enhancing the effectiveness of international humanitarian law. This study is an invaluable contribution to that goal.

FOREWORD BY DR. YVES SANDOZ

**Member of the International Committee of the Red Cross;
former Director of the ICRC Department of International Law
and Policy; Lecturer, Universities of Geneva and Fribourg**

The decision to go ahead with a study on customary international humanitarian law depended primarily on the answer to two questions – how useful it would be and how much it would cost – which together give us the famous cost-effectiveness ratio, something that must be taken into account in any undertaking, even if its purpose is humanitarian.

To be sure, applying the criterion of cost-effectiveness is not necessarily appropriate for humanitarian work since it would be cynical to attach a financial price to life and well-being. Nevertheless, those who run an organisation like the ICRC have a moral duty to seek maximum efficiency in the use to which they put their human and financial resources (while seeking to increase those resources). For, as long as there are wars, it will never be possible to do enough, or to do it well enough, to protect and assist those affected.

The international community has given the ICRC the onerous mandate to “work for the faithful application of international humanitarian law”. This imposes a duty of constant vigilance. For the ICRC, impartiality means not only avoiding discrimination between the different victims of a given conflict, but also constantly striving to ensure that all the victims of all the conflicts on the planet are treated equitably, without regional or ethnic preference and independently of the emotions sparked by media-selected images.

This concern to avoid discrimination and to ensure impartiality on a global scale guides the ICRC in choosing its activities. When the time comes to make these choices, meeting the victims’ urgent need for food and medical care logically remains the priority and claims far and away the largest part of the organisation’s budget. How could paying for a meeting of experts take precedence over delivering sacks of flour?

The choices, however, are not that stark. Experience has shown that nothing is to be gained by swinging blindly into action when the fighting starts. Many organisations have learned the hard way that you cannot be effective without first understanding the situation in which you are working, the mentality of those involved in the conflict and the society and culture of those you seek to aid. And if you must first understand, you must also be understood, not only by the combatants – who must know and accept the red cross and red crescent

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emblems and the principles of humanity, impartiality and neutrality symbolised by that emblem – but also by your intended beneficiaries.

The ICRC's long experience has convinced it that in order to be effective it has to engage in a wide range of activities, activities that must not be viewed in isolation but rather in relation to one another. The complementary nature of those activities has grown ever clearer with the passing years.

Each of these activities is linked to other activities, all fitting together to form a coherent edifice. That is, humanitarian action in the field prompts discussion, which then develops in meetings of experts of various kinds before eventually taking the form of treaty provisions or new international institutions such as the International Criminal Court, whose Statute was adopted in 1998. The next task is to work towards universal acceptance of the new rules by convincing the States through their governments, their parliaments, their senior officials, etc. of the importance of respecting such rules. Lastly, individual States must be encouraged to adopt national laws incorporating the new rules into domestic legislation, to ensure that the public knows and understands basic humanitarian principles, to ensure that international humanitarian law is adequately taught in schools and universities, and to integrate the subject into military training. The ultimate goal of all this work is to benefit the victims of war and facilitate the task of those seeking to help them.

But it will never be enough. War will remain cruel and there will never be adequate compliance with rules aimed at curbing that cruelty. New problems will arise requiring new forms of action and new discussion about the adequacy of existing rules or their application to new realities. And so the great wheel of law and humanitarian endeavour will continue to turn in the direction of a goal that may never be fully attained, that is, an end to armed conflict. Indeed, that goal sometimes seems to recede amid the pain and anguish of countless wars; but we must always struggle back towards it.

A lawyer in an office working on the development of international humanitarian law is doing a job different from that of the surgeon treating wounded people or a nutritionist in a refugee camp. But all three are in fact pursuing the same objective, each with his or her own place in the indispensable circle of law and humanitarian action.

Ascertaining the role played by legal experts is nevertheless not enough to justify a study on customary international humanitarian law. As part of the process outlined above, the ICRC has in recent years devoted significant resources to considering the state of the law and to spreading knowledge of it. But those resources are limited and choices must therefore be made between various options within the legal domain. Should priority be given to developing new law, promoting national legislation, clarifying certain aspects of practical implementation, consulting experts on sensitive questions, training the

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military or mobilising public opinion as a means of bringing about greater compliance? All these activities are necessary to some extent, but the question is where the priority belongs. The singular thing about the proposed study on customary law was that it was ill-suited to compromise and to half-measures. The choice was between doing it – and ensuring that one had the means to do it well – and foregoing it on the grounds that its value would rely totally on its credibility.

The decision was eventually taken to go ahead with the project. The ICRC's Legal Division was assigned this difficult task and given the means to do a thorough job. Lavish means were not necessary because the ICRC is lucky enough to be able to count on volunteer work by a wide range of the world's leading experts. And we cannot thank them enough for their generosity and commitment. But the administrative work involved and the tasks of organising meetings and translating a number of texts all obviously cost money, as does tapping the sources, in all corners of the world, on which the study is based.

How then can such an investment be justified? Why devote large-scale resources to clarifying what is customary in a branch of law that is so widely codified and by whose treaties the vast majority of States are bound? Many reasons can be given for this, but I will cite two which seem to me essential.

The first is that, despite everything, there remain in international humanitarian law vast but little-known reaches that it is important to explore more fully. This is particularly the case for the rules restricting the use of certain means and methods of warfare. These rules, which were laid down in the Additional Protocols of 1977, very directly concern the military, since it is they who have to implement these rules. If they are sometimes rather vague, this is because at the time of their adoption it was not possible for everyone to agree on a more precise formulation.

The problem is all the more sensitive as the great majority of modern-day armed conflicts are internal, while most of the rules in question are formally applicable only to international conflicts. For the average person, this is completely absurd. Indeed, how can one claim the right to employ against one's own population means of warfare which one has prohibited for use against an invader? Nevertheless, for historical reasons, precisely this distinction has been made. To be sure, treaties drawn up today tend to soften the effects of this distinction. It exists all the same, and the study on customary law makes it possible to ascertain the extent to which it has been blurred in practice and according to the *opinio juris* of the States.

The ICRC study also represents an excellent opportunity to view international humanitarian law in its entirety, asking what purpose it has served and how it has been applied, studying the relevance of its various provisions and determining whether some of the problems encountered today do not call for a fresh look at this or that provision.

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The study plays a capital role in answering these questions, especially as the problem is not to know whether given rules exist or not but rather how to interpret them. But this is no easy matter. Whatever else, the study's conclusions will serve as a valuable basis for identifying areas in the law that should be clarified or developed and for engaging in whatever dialogue or negotiation is necessary to strengthen the coherence of military doctrines and those of the jurisprudence of national and international courts, present or future. Therefore, coherence is indispensable to international humanitarian law's credibility.

The second reason is to be found not so much in the results of the study but in the study itself. Doing research throughout the world to find out how the rules are complied with, translated, taught and applied, then collating that information in order to ascertain both the successes and the remaining gaps – is all this not the best way to ensure more effective application of these rules, to stimulate interest, research and new ideas and, above all, to encourage dialogue between the world's different cultures? This undertaking has particular significance at a time of renewed tension for humanity when religious and cultural frictions are being exploited for violent ends. The Geneva Conventions have been universally embraced. The rules of international humanitarian law represent a kind of common heritage of mankind, with its roots in all human cultures. They can therefore be viewed as a cement between different cultures. It is thus essential to remind people of those rules and persuade them to comply. The study has been a golden opportunity to do this.

With the fruit of this enormous labour before us, one might think that the circle has been closed. The contrary is the case, however, and I would like to conclude by stressing that this study will have achieved its goal only if it is considered not as the end of a process but as a beginning. It reveals what has been accomplished but also what remains unclear and what remains to be done.

The study is a still photograph of reality, taken with great concern for absolute honesty, that is, without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility. But though it represents the truest possible reflection of reality, the study makes no claim to be the final word. It is not all-encompassing – choices had to be made – and no one is infallible. In the introduction to *De jure belli ac pacis*, Grotius says this to his readers: "I beg and adjure all those into whose hands this work shall come, that they assume towards me the same liberty which I have assumed in passing upon the opinions and writings of others." What better way to express the objective of those who carried out this study? May it be read, discussed and commented on. May it prompt renewed examination of international humanitarian law and of the means of bringing about greater compliance and of developing the law. Perhaps it could even help go beyond the

Cambridge University Press

978-0-521-80899-6 – Customary International Humanitarian Law

Jean-Marie Henckaerts, Louise Doswald-Beck, With contributions by Carolin Alvermann, Knut Dörmann, Baptiste Rolle
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subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative – in the century on which we have now embarked.

The study on customary international humanitarian law is more than the record of a worthy project – it is above all a challenge for the future.

ACKNOWLEDGEMENTS

The realisation of this study would not have been possible without the hard work and commitment of many. Persons from all corners of the globe and with different areas of expertise contributed to the study in the form of research, drafting, reviewing, fact-checking, editing, proofreading and expert advice. We are profoundly grateful to all of them for their dedication, support and assistance. While we have attempted to list each person individually, we are conscious there are also many unnamed persons who have helped in the accomplishment of this work. To all of them, we would also like to express our sincere gratitude and apologise in advance for any inadvertent omissions.

National Research Teams

The reports on State practice were prepared by the following teams:

Algeria: Professor Ahmed Laraba

Angola: Professor Maurice Kamto, with the assistance of Albert Hilaire Anoubon Momo and André Ndomikolayi

Argentina: Professor Raúl Emilio Vinuesa, with the assistance of Silvina Sandra Gonzalez Napolitano and Marta María Pastor

Australia: Professor Timothy McCormack, with the assistance of Gideon Boas, Malcolm Langford, Colin Andrew Hatcher, Virginia Newell and Shahyar Rousha

Belgium: Professor Eric David, with the assistance of Isabelle Kuntziger, Carlone Egels and Robert Remacle

The financial contribution of the Belgian Red Cross is gratefully acknowledged.

Bosnia and Herzegovina: Colonel Mugo Geć (Federation of Bosnia and Herzegovina) and Professor Liljana Mijović, with the assistance of Nedeljko Milijević (Republika Srpska)

Botswana: Professor Oagile Key Dingake

Brazil: Professor Antônio Augusto Cançado Trindade

Canada: Professor Katia Boustany (deceased), with the assistance of Maria Molina

Chile: Professor Hernán Salinas Burgos, with the assistance of Daniela Kravetz

xxvi *Acknowledgements*

- China:** Professor Tieya Wang (deceased), with the assistance of Professor Yong Zhang
- Colombia:** Fabricio López Sacconi, with the assistance of Raúl Hernández, Magaly Ramos, Sonia Torres and Mauricio Reyes
- Croatia:** Professor Maja Seršić, with the assistance of Professor Ksenija Turković, Davorin Lapas and Ivica Kinder
- Cuba:** Doctora María de los Angeles de Varona Hernández
- Egypt:** Professor Ahmed Abou El Wafa
- El Salvador:** Professor Antônio Augusto Cançado Trindade, with the assistance of Cristina Zeledon
- Ethiopia:** Professor Andreas Eshete, with the assistance of Alemu Brook
- France:** Professor Paul Tavernier, with the assistance of Eloi Fillion, Claire Servoin, Karine Mollard-Bannelier, Davide Ferrarini, Dr. Béatrice Maurer, Karine Christakis, Isabelle Capette, François Darribehaude, Sonia Parayre and Marianne Saracco
- Germany:** Professor Horst Fischer, with the assistance of Dr. Gregor Schotten and Dr. Heike Spieker
- India:** Professor Nripendra Lal Mitra, with the assistance of Dr. Umesh Veeresh Kadam (research coordinator), Dr. M. K. Nawaz, Dr. S. V. Joga Rao, Dr. V. Vijaya Kumar, M. K. Balachandran, T. S. Matilal and Rekha Chaturvedi
- Indonesia:** Professor G. P. H. Haryomataram, with the assistance of Fadillah Agus, Kushartoyo Budisantoso, Arlina Permanasari, Andrey Sujatmoko and Aji Wibowo
- Iran:** Professor Djamchid Momtaz, with the assistance of Farah Rahmani
- Iraq:** Professor Mohammed Abdallah Ad-Douri, with the assistance of Dr. Janan Sukker
- Israel:** Professor Yoram Dinstein, with the assistance of Dr. Fania Domb
- Italy:** Professor Gabriella Venturini, Professor Paolo Benvenuti, with the assistance of Dr. Enrico Casalini and Dr. Marco Graziani
- Japan:** Professor Hisakazu Fujita, with the assistance of Professor Akira Mayama, Yukiko Takashiba and Hiromi Yoshino
- Jordan:** Professor Mohamed Yousef Olwan, with the assistance of Lieutenant-Colonel Muhannad Hijazi and Dr. Ghazi Ar-Rashdan
- Korea (Republic of):** Professor Jae-Ho Sung, with the assistance of Dr. Min-Hyo Lee
- Kuwait:** Professor Eisa Al-Enezi
- Lebanon:** Professor Hassan Kassem Jouni, with the assistance of George Khalil Saad and Abdelrahman Makki
- Malaysia:** Professor Nurhalida binti Mohamed Khalil, with the assistance of Zalina binti Abdul Halim
- Netherlands:** Anna Nuiten, under the supervision of Dr. Gerard Tanja, Professor Frits Kalshoven, Hans Boddens Hosang, Katrien Coppens, Dr. Liesbeth Lijnzaad and Hanneke van Sambeek

Acknowledgements

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The financial contribution of the T.M.C. Asser Institute is gratefully acknowledged.

Nicaragua: Professor Antônio Augusto Cançado Trindade, with the assistance of Cristina Zeledon

Nigeria: Professor Amechi Uchegbu, with the assistance of Dr. B. O. Okere and Muhammed T. Ladan, Esq.

Pakistan: Ahmar Bilal Soofi, Esq.

Peru: Professor Raúl Emilio Vinuesa, with the assistance of Silvina Sandra González Napolitano, Marta María Pastor and Yesenia J. Cabezas Anicama

Philippines: Professor Alberto T. Muyot, with the assistance of Joel P. Raquedan and Vincent Pepito F. Yambao, Jr.

Russian Federation: Professor Igor Pavlovitch Blishchenko (deceased), with the assistance of Professor Aslan Abashidze

Rwanda: Professor Félicité Karomba, with the assistance of Straton Nsengiyumva

South Africa: Professor Michael Cowling

Spain: Dr. José Luis Rodríguez-Villasante y Prieto, with the assistance of Manuel Fernández Gómez, Professor Dr. Julio Jorge Urbina, Juan Manuel García Labajo, Juan Carlos González Barral, Vicente Otero Solana, Dr. Gonzalo Jar Couselo, David Suárez Leoz, Dr. Francisco Alonso Pérez, Sonia Hernández Prada, Professor Dr. Manuel Pérez González, Fernando Pignatelli Meca, Javier Guisández Gómez and Federico Bordas

Syria: Professor Muhammad Aziz Shukri, with the assistance of Dr. Amal Yaziji and Maan Mahasen

United Kingdom: Professor Françoise Hampson, with the assistance of Dr. Jenny Kuper.

The financial contributions of the British Red Cross and the Foreign and Commonwealth Office are gratefully acknowledged.

United States of America: Burrus M. Carnahan, with the assistance of Michael H. Hoffman and Professor Theodor Meron

Uruguay: Professor Raúl Emilio Vinuesa, with the assistance of Silvina Sandra González Napolitano and Marta María Pastor

Yugoslavia: Professor Milan ahović, with the assistance of Dejan ahović, Dr. Miodrag Starčević and Dr. Bosko Jakovljević

Zimbabwe: Professor Joel Zowa, with the assistance of Dr. Lovemore Madhuku

International Research Teams

The international research teams collected practice from international sources, consolidated their research with those of the national research teams and prepared the first draft of the study. The researchers are Richard Desgagné, Camille Giffard, Gustaf Lind, Gregor Schotten, Heike Spieker and Jean-François Quéguiner.

xxviii *Acknowledgements*

These researchers worked under the supervision of the Rapporteurs who presented a first assessment of customary international humanitarian law at the meetings of the Steering Committee and a second assessment during the consultations with academic and governmental experts. The Rapporteurs are Professors Georges Abi-Saab, Ove Bring, Eric David, Horst Fischer, Françoise Hampson and Theodor Meron.

The financial contributions of the British and Swedish Red Cross Societies and of the Swedish Ministry of Foreign Affairs towards the work of Professors Hampson and Bring respectively are gratefully acknowledged.

Steering Committee

The study was carried out under the guidance and with the advice of the Steering Committee, whose members are Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan ahović and Raúl Emilio Vinuesa.

Academic and Governmental Experts

The experts invited to comment on the first assessment provided by the international research teams are Abdallah Ad-Douri, Paul Berman, Sadi Çaycý, Michael Cowling, Edward Cummings, Antonio de Icaza, Yoram Dinstein, Jean-Michel Favre, William Fenrick, Dieter Fleck, Juan Carlos Gómez Ramírez, Jamshed A. Hamid, Arturo Hernández-Basave, Ibrahim Idriss, Hassan Kassem Jouni, Kenneth Keith, Githu Muigai, Rein Müllerson, Bara Niang, Mohamed Olwan, Raul C. Pangalangan, Stelios Perrakis, Paulo Sergio Pinheiro, Arpád Prandler, Pemmaraju Sreenivasa Rao, Camilo Reyes Rodríguez, Itse E. Sagay, Harold Sandoval, Somboon Sangianbut, Marat A. Sarsembayev, Muhammad Aziz Shukri, Parlaungan Sihombing, Geoffrey James Skillen, Guoshun Sun, Bakhtyar Tuzmukhamedov and Karol Wolfke.

ICRC Research Team

Numerous persons at the ICRC have worked on the study doing research, checking information and providing editorial assistance, in particular for Volume II. Etienne Antheunissens and Tudor Hera carried out research into the ICRC archives. Carolin Alvermann, Sarah Avrillaud, Gilles Benedick, Joanna Bourke-Martignioni, Angela Cotroneo, Eloi Fillion, Emanuela-Chiara Gillard, Neal Gilmore, Antoine Grand, Valérie Houetz, David Kootz, Carine Nassif, Anna Nuiten, Aurélie Legrand, François Moreillon, Stéphane Ojeda, Guilhem Ravier, Baptiste Rolle, Ion Smochina, Nadine Thwaites, Huyghen van den Eertwegh and Barbara Van der Beken contributed to the final version of

Acknowledgements

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Volume II during different stages of the long writing process. In so doing, they benefited from the assistance of Laila Bahaa-el-Din, Namuezi Fedi, Tristan Ferraro, Marie-Eve Friedrich, Francisco-Javier Leon-Diaz and Nathalie Stadelmann and from numerous ICRC staff members in the field who provided additional information on national legislation and case-law. Jérémie Labbe Grenier, Yasmine Hadjoudj, Haleh Mehran and Tobias Schaffner completed the final arduous task of checking the footnotes of Volume I. All these people amply deserve a heartfelt “thank you”.

Research would not have been possible without the assistance of Monica Cometti, Magalie Develon, Florence Gaspar, Brigitte Gremaud and Jean Perrenoud at the ICRC Information and Documentation Center, as well as all the staff at the UN Library in Geneva, in particular Werner Simon, and Jan Hladík at UNESCO Headquarters in Paris.

In addition, we would like to thank Patricia Barbey, Lydie Beguelin, Vojislava Bursac, Renée Bretton, Séverine Mueller-Moine, Christine Pellaton, Janine Rossier, Elodie Straub, Sandrine Wagner and Nina Zufferey for providing indispensable administrative support.

We are also very grateful to all our colleagues, and former colleagues, at the ICRC who so generously gave of their time to review the drafts of Volume I and who provided many insightful comments, including Raoul Bittel, Serge Bourgeois, Laurent Colassis, Isabelle Daoust, Marie-José d’Aprikle, Richard Desgagné, Annemarie Dick, Knut Dörmann, María Teresa Dutli, Alexandre Faite, Emanuela-Chiara Gillard, Thomas Graditzky, Paul Hardy, Peter Herby, Rikke Ishøy, Bertrand Levrat, Charlotte Lindsey-Curtet, Barbara Jaeggi, Isabelle Kuntziger, Jean-Philippe Lavoyer, Kathleen Lawand, Dominique Loye, Louis Maresca, Nils Melzer, Laura Olson, Jelena Pejic, Cristina Pellandini, Gabor Rona, Anne Ryniker, Silvia Schaller, Anna Segall, Philip Spoerri, Sylvie van Lammeren and Ameer Zemmali.

A very special word of thanks is due to Knut Dörmann, Emanuela-Chiara Gillard, Laura Olson, Gabor Rona and Jelena Pejic who read and commented on all the drafts and provided invaluable support throughout the writing process.

We owe a special debt of gratitude for the advice and constructive criticism from Maurice Mendelson and Karol Wolfke, who reviewed the introductory part on the assessment of customary international law, and from Sadi Çaycı, Edward Cummings, Eric David, Yoram Dinstein, William Fenrick, Dieter Fleck, Juan Carlos Gómez Ramírez, Michael Meyer, Theodor Meron, Raul Pangalangan, Peter Rowe, Milan ahović, Marat Sarsembaev, Helen Upton, Elizabeth Wilmshurst and Karol Wolfke for their comments on different drafts of Volume I and Jan Hladík at UNESCO for reviewing the draft chapter on cultural property.

Special thanks are also due to Knut Dörmann, Horst Fischer, Theodor Meron, the Mines and Arms Unit of the ICRC led by Peter Herby, William Fenrick and Antonio Cassese for reviewing Parts I–VI of Volumes I and II respectively.

xxx *Acknowledgements*

The authors express their genuine appreciation to François Bugnion, Jean-Philippe Lavoyer and Yves Sandoz for their advice, comments and support throughout the genesis of this study.

Lastly our sincere gratitude goes to Christina Grisewood for the monumental task of copy-editing both Volumes I and II, to Philippa Youngman, who prepared the copy for typesetting, and the staff at Cambridge University Press, in particular Finola O'Sullivan for supervising publication and Neil de Cort and Alison Powell for overseeing the production.

This study would not have been possible without the patience, support and encouragement of Mei and Josef.

Geneva, August 2004

Jean-Marie Henckaerts
Louise Doswald-Beck

INTRODUCTION

International humanitarian law has its origins in the customary practices of armies as they developed over the ages and on all continents. The “laws and customs of war”, as this branch of international law has traditionally been called, was not applied by all armies, and not necessarily vis-à-vis all enemies, nor were all the rules the same. However, the pattern that could typically be found was restraint of behaviour vis-à-vis combatants and civilians, primarily based on the concept of the soldier’s honour. The content of the rules generally included the prohibition of behaviour that was considered unnecessarily cruel or dishonourable, and was not only developed by the armies themselves, but was also influenced by the writings of religious leaders.

The most significant landmark from the point of view of cataloguing these customs in one document was the drafting by Professor Francis Lieber of the Instructions for the Government of Armies of the United States in the Field, promulgated as General Order No. 100 by President Lincoln in 1863 during the American Civil War. The Lieber Code, as it is now known, strongly influenced the further codification of the laws and customs of war and the adoption of similar regulations by other States. Together, they formed the basis of the draft of an international convention on the laws and customs of war presented to the Brussels Conference in 1874. Although this conference did not adopt a binding treaty, much of its work was later used in the development of the 1899 and 1907 Hague Conventions and Declarations. These treaties did not codify all aspects of custom, but its continued importance was reaffirmed in the so-called “Martens clause”, first inserted in the preamble to the 1899 Hague Convention (II), which provides that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

The importance attributed to customary law, despite, or because of, its partial codification, was most clearly seen in the reliance placed on it by the various war crimes trials after both the First and Second World Wars.¹

¹ See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003.

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The driving force behind the development of international humanitarian law has been the International Committee of the Red Cross (ICRC), founded in 1863. It initiated the process which led to the conclusion of the Geneva Conventions for the protection of the victims of war of 1864, 1906, 1929 and 1949. It was at the origin of the 1899 Hague Convention (III) and 1907 Hague Convention (X), which adapted, respectively, the 1864 and 1906 Geneva Conventions to maritime warfare and were the precursors of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949. It took the initiative to supplement the Geneva Conventions that led to the adoption in 1977 of two Additional Protocols. The ICRC has both encouraged the development of and been involved in the negotiation of numerous other treaties, such as the 1980 Convention on Certain Conventional Weapons, the 1997 Ottawa Convention banning anti-personnel landmines and the 1998 Statute of the International Criminal Court. Recognition of this role is reflected in the mandate given to the ICRC by the international community to work for “the faithful application of international humanitarian law applicable in armed conflicts” and for “the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof”.²

More than 50 years have now passed since the Geneva Conventions of 1949 were adopted and almost 30 years since the adoption of their Additional Protocols. These years have, unfortunately, been marked by a proliferation of armed conflicts affecting every continent. Throughout these conflicts, the Geneva Conventions – and in particular Article 3 common to the four Conventions, applicable in non-international armed conflicts – together with their Additional Protocols have provided legal protection to war victims, namely persons who do not or no longer participate in hostilities (the wounded, sick and shipwrecked, persons deprived of their liberty for reasons related to the conflict, and civilians). Nevertheless, there have been countless violations of these treaties and of basic humanitarian principles, resulting in suffering and

² Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Article 5(2)(c) and (g) respectively. The Statutes were adopted by the States party to the Geneva Conventions and the members of the International Red Cross and Red Crescent Movement. This mandate was first given to the ICRC by Article 7 of the Statutes of the International Red Cross adopted by the 13th International Conference of the Red Cross, The Hague, 23–27 October 1928, according to which “all complaints in regard to alleged violations of the international Conventions, and in general, all questions calling for examination by a specifically neutral body, shall remain the exclusive province of the International Committee of the Red Cross”. Subsequently, Article 6(4) and (7) of the Statutes of the International Red Cross adopted by the 18th International Conference of the Red Cross, Toronto, 22 July–8 August 1952, stated that the ICRC “undertakes the tasks incumbent on it under the Geneva Conventions, works for the faithful application of these Conventions and takes cognizance of complaints regarding alleged breaches of the humanitarian Conventions” and “works for the continual improvement and diffusion of the Geneva Conventions”.