International Humanitarian Law and the International Red Cross and Red Crescent Movement

Edited by
Aldo Zammit Borda

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This book provides a key reference on the role of the Commonwealth and its member states in relation to international humanitarian law (IHL). It provides insights in the implementation of IHL in Commonwealth states and, particularly, the challenges faced by small states. It examines the progressive development of IHL in the Commonwealth and provides an analysis of some of the landmark decisions emerging from the Special Court for Sierra Leone.

The book was developed collaboratively between the Commonwealth Secretariat and the International Red Cross and Red Crescent Movement. In this regard, it contains insights in the work of the Secretariat with regard to implementation of IHL and an assessment of legislation enacted by Commonwealth states as well as an accession chart to IHL instruments. It expounds on the work of the Movement, including the role of National Societies, the International Humanitarian Fact-Finding Commission, and the development of international disaster response law, rules and regulation.

This book was based on a special issue of *Commonwealth Law Bulletin*.

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Foreword

International humanitarian law is designed to protect the victims of armed conflict. In the words of the International Committee of the Red Cross, even wars have limits. In its modern treaty form, international humanitarian law began in 1864, with the first Geneva Convention for the amelioration of the condition of the wounded in armies in the field. It was adopted following the horrors of the Battle of Solferino of 1859 observed by Henry Dunant, one of the founders of the worldwide Red Cross and Red Crescent Movement. That Convention was adapted to apply to maritime warfare in 1906 and 1907 in the Convention for the wounded, sick and shipwrecked armed forces at sea, following such wars as those between Japan and Russia. The inadequacies of the Hague Regulations of 1899 and 1907 concerning the laws and customs of war led, after the Great War, to the preparation of the third Convention on the protection of prisoners of war. The plans for a conference to adopt a convention on the protection of civilians, especially in occupied territory, were tragically frustrated by the outbreak of the Second World War. The dreadful events of that war resulted in the adoption of the fourth Convention on the protection of civilians in time of war in 1949 when the other texts were also updated. All four Conventions also incorporate what is known as a mini convention stating basic obligations for wars not of an international character, reflecting inadequacies in the law which had been highlighted in the Spanish Civil War in the 1930s. That mini convention, among other things, stated an unqualified prohibition on torture.

I have briefly indicated some of the reasons for the adoption of each of those four Conventions to emphasise that they came out of the harsh realities of war. They are not theoretical constructs dreamt up in an ivory tower. They recognise the demands of military necessity. The recognition of both humanity and military necessity appears in the fact that the four Conventions have been adopted universally, by the governments of every State in the world, all 194.

Over the next 20 or more years, following the adoption of the four 1949 Conventions, the challenges of the increasing numbers of armed conflicts which were internal, not international, and the growing recognition of the impacts of new military technology developed over the century, especially in aerial warfare, on civilian populations (a rapidly increasing proportion of war deaths and casualties), led to the drafting and adoption of the 1977 Additional Protocols, one concerned with international armed conflicts and the other with non-international. They have been widely accepted, now by 168 and 164 States, respectively. (A third Additional Protocol dealing with the vexing problem of the emblem was adopted in 2005 and has now been accepted by 33 States including five from the Commonwealth.)

Those involved in preparing those treaty texts from 1864 through to the 1970s were concerned not only with updating the substance of the law to cover new and developing areas but also with the critical matter of getting better compliance with that law. The means within the Conventions and Protocols include: instruction and education for the military, in schools and more widely, through national societies as well as through governments;

prosecution and discipline of alleged offenders, nationally and internationally, in the case of certain grave breaches of the Conventions and Protocols (an obligation which includes the enactment of the necessary legislation); protecting powers; the services of the ICRC; inquiry; fact finding and good offices. To those methods have been added *ad hoc* international criminal tribunals, for instance at Nuremberg and Tokyo after the Second World War and for the former Yugoslavia and Rwanda in the 1990s, the International Criminal Court in 1998 and the hybrid tribunals for Sierra Leone, Cambodia, East Timor and Lebanon. Issues relating to international humanitarian law also arise in other international courts and tribunals, including the International Court of Justice in The Hague, for instance in judgments relating to warfare in the Balkans and in the Great Lakes area in central Africa and in the advisory opinion relating to the legality of the use of nuclear weapons. One very encouraging feature of this Special Issue of the *Commonwealth Law Bulletin* is the major emphasis it places on better implementation of this vital area of law.

That emphasis continues to be seen in the deliberations of international conferences, notably for present purposes at the Second Commonwealth Red Cross and Red Crescent International Humanitarian Law Conference. It was attended by more than 150 representatives of about 45 Commonwealth Governments and National Societies in Wellington, New Zealand, in August 2007 (www.redcross.org.nz/ihl/outcome). That meeting agreed among other things

> 5 to encourage National Societies to give greater priority to publicising, applying and promoting, both nationally and internationally, respect for international humanitarian law in their programmes of activity and their policies;
>
> ...
>
> 7 to encourage States to examine their existing legislation and, where necessary, to adopt effective legislative and other measures to implement those international humanitarian law treaties to which they are a party.

The Conference itself was a means of promoting better knowledge of international humanitarian law and as a consequence better compliance with it. So too are publications like this Special Issue. The emphasis of that meeting on getting better compliance with the law was to be seen just a few months later, in Geneva, in the deliberations and outcomes of the 30th International Conference of the Red Cross and Red Crescent Movement.

The Commonwealth Conference also gave close attention to the valuable, painstaking work of the ICRC and a wide range of experts and consultants it engaged, which led to the publication in 2005 of the ICRC Customary Law Study, again a topic considered in this Special Issue. The preparation of that study involved the gathering of relevant national, international and other practice supporting and developing the treaty texts, a process of collection which continues to this day. In the opinion of the authors of the study and the wider movement which supported it, the gathering and assessment of all that practice and its formulation in 161 rules of customary international law was important, for several reasons. One was to state in a much extended form the law applicable to non-international armed conflicts beyond that stated all too briefly in the 'mini convention' of 1949 and in the second Additional Protocol of 1977.

A second reason was the emphasis, in particular for the States which have yet to accept the 1977 Protocols, on the customary law status of the rules in those Protocols. That was particularly important so far as they updated the law regulating methods and means of warfare and the protection of the civilian population, especially from the effects of hostilities, and also the law for the protection of persons in the power of a party to the conflict. That last section includes provisions guaranteeing fundamental rights, stated in

essentially the same terms as are found in the International Covenant on Civil and Political Rights. That statement again includes a prohibition on torture. That essential identity of statement is yet another recognition of the basis of international humanitarian law in human dignity, a matter which will no doubt receive added recognition in this year which marks the 60th anniversary of the Universal Declaration of Human Rights.

The Customary Law Study is valuable for a third reason: customary international law may help in the interpretation of treaty law. It also provides a much briefer statement of the essentials of the law than do the many pages and provisions of the four Conventions, the Protocols and many other treaties. That concentration has real value for the effective dissemination of the text, as does the brief 1978 statement of seven fundamental rules prepared by the ICRC. Different texts are appropriate for different audiences.

This foreword has so far emphasised the development of the Geneva texts from 1860 to the present. The law and practice regulating warfare may be traced back to much earlier times in all cultures and civilisations, and the Wellington Conference heard something of that. This law has a universal character; it forms part of the common heritage of humanity. Much of the law is also to be found in modern texts adopted outside the Geneva system such as the Ottawa Landmines Convention and very recently the Oslo Cluster Munitions Convention. Another new developing area is disaster relief law, also the subject of study by the International Law Commission of the United Nations.

This Special Issue considers subjects touched on above and others. It provides yet another recognition by a Commonwealth body of the essential mission of this body of law which places everyone affected by armed conflict, civilian and combatant alike, under the protection and authority of the written law, and the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. Those are the words of Frederic de Martens, a major Russian figure in the development of the law a century ago, as most recently repeated in the 1977 First Protocol.

K.J. Keith

Judge, International Court of Justice

Chair, Second Commonwealth IHL Conference

The Hague, 22 September 2008

Preface

International Humanitarian Law (IHL) differs from other branches of contemporary international law in that it currently develops independently from the framework of the United Nations, though in close association therewith. The International Committee of the Red Cross (ICRC), as an independent and neutral entity, has been concerned, from the beginning, with the development of modern IHL, and acts exclusively in the pursuit of humanitarian interests and the protection of vulnerable individuals when war rears its ugly head.

It is natural that the Commonwealth, with its commitment to dignity, humanity and the rule of law, should take an interest in IHL since this aspect of law helps to inculcate principles of humanity, limits violence and preserves global peace.

In this respect, the Commonwealth has engaged closely with the International Red Cross and Red Crescent Movement. Two Commonwealth Red Cross and Red Crescent International Humanitarian Law Conferences were organised, one in London (2003) and another in Wellington (2007), as well as a Meeting of Commonwealth National Committees on International Humanitarian Law in Nairobi (2005).

Since 1999, the ICRC's Advisory Service on IHL has worked with Commonwealth Member States in a variety of ways. It has encouraged Member States to ratify IHL treaties and has assisted in the adoption of national legislative and administrative measures.

Successive Commonwealth Heads of Government Meetings have likewise drawn attention to IHL issues, such as anti-personnel landmines, the International Criminal Court, children and armed conflict, the protection of civilians and small arms and light weapons. Indeed, the Abuja Communiqué of 2003 urged all countries to accede to the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, and the Malta Communiqué of 2005 urged States that have not yet done so to accede to the Rome Statute of the International Criminal Court.

The ICRC has also been regularly invited to present papers to Law Ministers and Senior Officials of the Commonwealth and, at the most recent Commonwealth Law Ministers Meeting, in Edinburgh (2008), the ICRC informed Ministers on the ratification and implementation status of the core IHL treaties by Commonwealth Member States, and on International Disaster Response laws, rules and principles.

This Special Issue of the *Commonwealth Law Bulletin* on International Humanitarian Law provides further attestation of the strong engagement between the Commonwealth and the International Red Cross and Red Crescent Movement. It aims to examine some of the key challenges facing the development of IHL today. The contributors are experts in their field and the focus is on the Commonwealth experience. It is hoped that you will find this Special

Issue a useful resource and, as such, that you will find it both an interesting and informative read.

Betty Mould-Iddrisu
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London, 15 September 2008

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Introduction to International Humanitarian Law

ALDO ZAMMIT BORDA
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International Humanitarian Law (IHL) is that portion of international law which is inspired by considerations of humanity. It aims to minimize the suffering of those not, or no longer, taking part in hostilities and to render the fighting more humane by restricting the use of barbaric weapons. Although the origins of contemporary IHL can be traced back to the nineteenth century, it is based on principles and practices which are much older. The two principal sources of IHL are the Hague and Geneva Conventions, the former setting out restrictions on the means and methods of warfare and the latter providing protection to certain categories of vulnerable persons. It is generally accepted that a large portion of the principles permeating IHL reflect customary international law and, in some cases, peremptory law (*jus cogens*). As such, it is binding on all States, irrespective of whether they have acceded to the relevant treaties. Although IHL has made a difference in protecting vulnerable individuals and restricting the means and methods of warfare, tragically, there are countless examples of violations of IHL in armed conflicts around the world and a number of other challenges still remain.

Introduction

International Humanitarian Law (IHL), which is also known as the 'Law of War' and the 'Law of Armed Conflict', is that portion of international law which is inspired by considerations of humanity and is centred on the protection of certain vulnerable individuals in time of armed conflict and on rendering the fighting more humane.

Professor Jean Pictet, who played a major role in the work of developing IHL undertaken by the International Committee of the Red Cross (ICRC),[1] has argued that the provisions of IHL are in fact a transposition into international law of moral, and more specifically, humanitarian concerns:

> It is precisely because this law is so intimately bound to humanity that it assumes its true proportions, for it is upon this category of law, and no other, that the life and liberty of countless human beings depend if war casts its sinister shadow across the world.[2]

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1 For a clear outline of the International Red Cross and Red Crescent Movement, and its three components, i.e. the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies and the recognized National Red Cross and Red Crescent Societies, refer to the article on: 'National Red Cross and Red Crescent Societies: Humanitarian Partner of Choice for Commonwealth States' *infra*.

2 Professor Pictet was vice president of the ICRC and chairman of the ICRC Law Commission. See Pictet, J. (1985) *Developments and Principles of International Humanitarian Law* (Boston: Martinus Nijhoff Publishers), p. 1.

This article aims to provide a general introduction to IHL. It will firstly outline the origins of contemporary IHL from the latter part of the eighteenth century and the nineteenth century. It will proceed to consider its sources, including treaties and customary law. The two areas covered by IHL, namely, means and methods of warfare; and protection of certain categories of persons are discussed next, followed by a discussion on IHL's application. The article concludes by setting out some challenges to the effective development and implementation of IHL.

Origins

Although the origins of contemporary IHL can be traced back to the nineteenth century, it is based on principles and practices which are much older.[3] In the sixteenth and seventeenth centuries, the rationale of the laws governing the conduct of hostilities was to minimize the harm inflicted in the exercise of the right of a sovereign to wage a 'just war':

> The balance of evil and good was sought to be struck by reference to the doctrine of necessity. It was held to be a 'general rule from the law of nature' that as long as the end pursued by the war was just, armed violence necessary to achieve that end ... was permissible. No distinction was drawn per se between soldiers and civilians, nor between military and civilian property, although reason dictated that the killing of civilians and the destruction of civilian property was usually unnecessary and therefore unlawful.[4]

The dominance of autonomous sovereign States in the latter part of the eighteenth century and the nineteenth century,[5] together with the growing influence of humanism, allowed for an increased focus on the conduct of warfare, and what is today known as IHL emerged as a set of independent rules[6] which represent a careful balance between the requirements of humanity and military necessity.[7]

The 1864 Diplomatic Conference, which was convened by the Swiss government and chaired by General Guillaume-Henri Dufour,[8] adopted the Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle (Red Cross Convention). This Convention laid the foundations for contemporary humanitarian law. It was chiefly characterized by:

1. standing written rules of universal scope to protect the victims of conflicts;
2. its multilateral nature, open to all States;

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3 Doebbler, C. F. J. (2005) *Introduction to International Humanitarian Law* (Washington: CD Publishing), p. 5. See also Bantekas, I. (2002) *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester: Manchester University Press), p. 1; Elias, T. O. (1979) *New Horizons in International Law* (Leiden: Brill Publishers), p. 181.

4 O'Keefe, R. (2006) *The Protection of Cultural Property in Armed Conflict*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press), pp. 5–6.

5 In this period, international law had very little to say about when sovereign States could wage war, and the distinction between 'just' and 'unjust' wars become increasingly blurred. See Kennedy, D. (2006) Reassessing International Humanitarianism: The Dark Sides, in A. Orford (Ed.) *International Law and its Others* (Cambridge: Cambridge University Press), p. 144.

6 Gardam, J. (2004) *Necessity, Proportionality and the Use of Force by States*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press), p. 29.

7 International Committee of the Red Cross (ICRC), *What is International Humanitarian Law?*, Advisory Service on International Humanitarian Law, Geneva. Available at www.icrc.org.

8 One of the five founding members of the ICRC. The others were: Gustave Moynier, Henry Dunant, Dr Louis Appia and Dr Théodore Maunoir.

3. the obligation to extend care without discrimination to wounded and sick military personnel;
4. respect for and marking of medical personnel, transports and equipment using an emblem (red cross on a white background).[9]

Following adoption of this Convention, the First and Second Hague Peace Conferences, held in 1899 and 1907 respectively, aimed partly to prevent war and partly to define rules of warfare.

The 1899 First Hague Peace Conference was convened with the object of seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments.[10] This Conference, which was summoned without reference to any particular war, was regarded as the culmination of the peace movement.[11]

The Conference adopted three Conventions and three Declarations.[12] In its Final Act,[13] the Conference also expressed the wish that a number of outstanding issues, such as the limitation and/or reduction of armaments and the rights and duties of neutrals, be considered by a subsequent Conference.

The 1907 Second Hague Peace Conference was thus convened for the purpose of giving a fresh development to the humanitarian principles which served as a basis for the work of the First Conference of 1899.[14] The Conference adopted 13 Conventions and two Declarations.[15]

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9 ICRC (2002) *What are the Origins of International Humanitarian Law?*, Advisory Service on International Humanitarian Law, Geneva. Available at www.icrc.org.

10 Russian note of 30 December 1898/11 January 1899. Available at http://www.yale.edu/lawweb/avalon/lawofwar/hague99/hag99-02.htm.

11 Villiger, M. E. (1985) *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Boston: Martinus Nijhoff Publishers), p. 66.

12 These were: (a) Convention for the peaceful adjustment of international differences; (b) Convention regarding the laws and customs of war by land; and (c) Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of the 22 August 1864. The three Declarations were: (a) To prohibit the launching of projectiles and explosives from balloons or by other similar new methods; (b) To prohibit the use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases; and (c) To prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.

13 *Final Act of the International Peace Conference; July 29, 1899*, The Avalon Project at Yale Law School, 1998. Available at http://www.yale.edu/lawweb/avalon/lawofwar/final99.htm.

14 *Final Act of the Second Peace Conference. The Hague, 18 October 1907*, International Committee of the Red Cross, Treaties Home. Available at http://www.icrc.org/ihl.nsf/FULL/185?OpenDocument.

15 These were: (a) Convention for the pacific settlement of international disputes; (b) Convention respecting the limitation of the employment of force for the recovery of contract debts; (c) Convention relative to the opening of hostilities; (d) Convention respecting the laws and customs of war on land; (e) Convention respecting the rights and duties of neutral powers and persons in case of war on land; (f) Convention relative to the status of enemy merchant ships at the outbreak of hostilities; (g) Convention relative to the conversion of merchant ships into warships; (h) Convention relative to the laying of automatic submarine contact mines; (i) Convention respecting bombardment by naval forces in time of war; (j) Convention for the adaptation to naval war of the principles of the Geneva Convention; (k) Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war; (l) Convention relative to the creation of an International Prize Court; and (m) Convention concerning the rights and duties of neutral powers in naval war. The two Declarations were: (i) To prohibit the discharge of projectiles and explosives from balloons; and (ii) On compulsory arbitration. This Conference also gave rise to the Permanent Court of Arbitration, the oldest international legal institution in the Hague. See van Krieken, P. and McKay, D. (2005) *The Hague—Legal Capital of the World* (Cambridge: Cambridge University Press), p. 113.

Though not negotiated in the Hague, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Gas, and for Bacteriological Methods of Warfare, is considered a further addition to the Hague Conventions.[16]

The 1899 and 1907 Peace Conferences have been hailed as 'landmarks' and an 'epoch in the history of international law',[17] and much of the law they gave rise to is accepted as customary international law.

Following the atrocities of World War II, four Geneva Conventions were concluded in 1949 to mitigate the effects of war by protecting people who do not take part in the fighting (civilians, medics, chaplains, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war), known as *persons hors de combat*.[18] These Conventions recognize two types of violations, namely: 'grave breaches' and other prohibited acts not falling within the definition of grave breaches.[19]

The first Geneva Convention ('for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field') and the second Geneva Convention ('for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea') are similar, covering land and sea respectively. They provide minimum standards of protection for members of the armed forces who become wounded or sick.

The third Geneva Convention ('Relative to the Treatment of Prisoners of War') lays down minimum standards of protection for members of the armed forces who are captured by the enemy. Prisoners of war must, *inter alia*, be treated humanely with respect for their persons and their honour and quickly released and repatriated when hostilities cease.

The fourth Geneva Convention ('Relative to the Protection of Civilian Persons in Time of War') covers all civilians who do not belong to the armed forces, take no part in the hostilities and find themselves in the hands of the Enemy or an Occupying Power. The Convention lays down minimum standards of protection for such civilians, which include protection against acts or threats of violence, insults and public curiosity, and protection from being used to shield military operations.

The 1949 Geneva Conventions were supplemented in 1977 with the addition of two Protocols on the Protection of Victims of International Armed Conflicts and Protection of Victims of Non-International Armed Conflicts, and in 2005 by the addition of a third Protocol on the Red Crystal as an additional distinctive emblem.

Sources

The corpus of international law devoted to IHL has expanded over the past decades, primarily because of renewed interest in international dispute resolution, the decline in the traditional doctrine of sovereignty and the related growth of norms recognizing the

16 See Zammit Borda, A. (2003) *The Threat and Use of Chemical and Biological Weapons under International Law*, LLD Thesis, p. 19. Available at the Peace Palace Library, The Hague.

17 Villiger, *op. cit.*, n 11, p. 66.

18 See ICRC (2006) *The Geneva Conventions: The Core of International Humanitarian Law*. Available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/genevaconventions.

19 The term 'grave breaches' is defined in Articles 50, 51, 130 and 147 of the I, II, III, and IV Geneva Conventions respectively, and includes wilful killing, torture or inhuman treatment, if committed against persons or property protected by the Conventions.