

# **International Humanitarian Law**



**O R I G I N S**



**Edited by  
John Carey  
William V. Dunlap  
R. John Pritchard**

# **International Humanitarian Law: Origins**

edited by

**John Carey**

**William V. Dunlap**

**R. John Pritchard**



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**R. John Pritchard** earned his A.B. in History from the University of California at Riverside, an M.A. (History) and Ph.D. (Econ.) in International History from the London School of Economics & Political Science (University of London), an LL.B. in Law from the University of Kent at Canterbury, and took the Bar Vocational Course at the Inns of Court School of Law in London. He is a Fellow of the Royal Historical Association and a Member of the Middle Temple. He was the founding Managing Director and later Chairman of Integrated Dictionary Systems Ltd. (now Integrated Document Systems Ltd.), Proprietor of Legal & Historical Enterprises and was the founding Director of the Robert M.W. Kempner Collegium from 1996–2000. He has held academic appointments in History and Law at the University of California; the London School of Economics & Political Science; Kings College (London); St. Antony's College, Oxford; the Victoria University of Manchester, the University of Kent at Canterbury, and Stafford House College, Canterbury. In addition to published books on International Criminal Law and human rights law including *The Tokyo Major War Crimes Trial*, a new and definitive 124-volume collection on the International Military Tribunal for the Far East (1998–), and numerous contributions to collective works such as his "International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia", in 3: *Enforcement, International Criminal Law* 109 (M. Cherif Bassiouni ed., 2d ed., 1998), he is the author of a number of works on political and international history including *Total War: Causes & Courses of the Second World War* (with Peter Calvocoressi and the late Guy Wint, 1989, 1995, 1999 & 2001 eds.); *The Reichstag Fire: Ashes of*

*Democracy* (1971), and *Far Eastern Influences upon British Strategy towards the Great Powers* (1987). Among his most recent articles bearing upon the subject-matter of the present volume are “The Gift of Clemency following British War Crimes Trials in the Far East, 1946–1948,” 7 *Criminal Law Forum* 15 (1996); “Casual Slaughters, Accidental Judgments,” 10 *Criminal Law Forum* 505 (1999), and “Changes in Perception: British Civil and Military Perspectives on War Crimes Trials and their Legal Context (1942–1956),” in *The Military Dimension, 5 A History of Anglo-Japanese Relations* (Ian Gow & Hirama Yoichi, eds. 2002). He has other works in progress on the British trials of Japanese war criminals and on all of the Allied Trials of Italian war criminals in the aftermath of the Second World War, an updated edition of Sir John Frederick Maurice’s classic work *Hostilities without Declaration or War: An Historical Abstract of the Cases in Which Hostilities Have Occurred between Civilized Powers Prior to Declaration or Warning* (1st ed. 1883), and further work on the subject of the present chapter.

**Jane L. Garwood-Cutler** received her B.S. in Physiology at the University of Illinois, Urbana-Champaign; took an M.D. degree course at the University of Illinois, Abraham Lincoln School of Medicine in Chicago, and was a Medical Practitioner, MacNeal Hospital, Berwyn, Illinois from 1975 to 1985 when she retired to devote more time to her young family. She became a freelance editor and writer for national consumer magazines, on health and welfare issues and computer software engineering, 1985–1993; took her J.D. degree at DePaul University School of Law Fellow, and is a Member of the Illinois State Bar. She was Assistant to the Director, Professor M. Cherif Bassiouni, at a Conference on Establishment of the Permanent International Criminal Court, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy, 1995; Research Assistant at the International Human Rights Law Institute, DePaul University, Chicago, 1995–1996; and Program Director at the International Institute of Higher Studies in Criminal Sciences, 1996, before working on the Italian War Crimes Trials Project for the Robert M.W. Kempner Collegium with R. John Pritchard, with whom she co-authored a review of the Al Adsani Torture Case and co-founded RightSearch. In addition to editing new editions of half a dozen books and several major articles for Cherif Bassiouni, she has contributed chapters on the British War Crimes Act 1991 and the U.S. Alien Tort Claims Act 1789 to *International Criminal Law* (M. Cherif Bassiouni ed., 2d ed., 1999).

**Carrington Williams** was one of 25 American lawyers selected to serve as American Associate Defense Counsel at the International Military Tribunal for the Far East (the Tokyo War Crimes Trial), 1946–1948. Born in 1919, he hails from an old Virginian family and received his A.B. from Johns Hopkins University in 1940, an LL.B. from the University of Virginia Law School in December 1942, and an honorary doctorate in law from Shenandoah University (2000). Directly out of law school, he entered the U.S. Army Air Corps and saw active service in the Pacific Theater. His lifelong interests in political affairs, military history, and aviation are abundantly evident from his service as a Member

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Carrington Williams wanted it to be known that his chapter in the present work is dedicated to the memory of his first cousin, Monroe Leigh, a distinguished scholar, former President of the American Society of International Law, and Legal Adviser to the United States Departments of State and Defense, who passed away in November 2001, and who remained to the last passionately committed to United States ratification of the 1998 Treaty of Rome to establish the permanent International Criminal Court.

**Bohunka O. Goldstein** was raised under Communist rule in Czechoslovakia and witnessed the 1989 revolutionary changes as a law student at Charles University in Prague. After coming to the United States in 1991 to study English and to teach Russian, one of the four languages in which she is fluent, she married and became a U.S. citizen. At Northwestern University School of Law she earned an LL.M. degree in 1996, after having won an M.A. in political science in the previous year at Northern Illinois University. Ms. Goldstein works as an attorney for the New York Association for New Americans, which provides immigration legal services to the foreign born. Her former legal work was in offices in Prague, Salt Lake City, and New York City. She served as Fellow at the International Human Rights Law Institute at DePaul University under the President of the Institute, M. Cherif Bassiouni. Volume 1 of *International Criminal Law*, edited by Professor Bassiouni, includes Ms. Goldstein's article "Regulation of Mercenarism under International Law." Another of her articles, "Women in Russia of the 1990s: Selected Annotated Bibliography," appears at 14 *Behavioral & Social Sciences Librarian* 43 (1995).

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The views expressed in this article are those of the author in his personal capacity and do not necessarily reflect those of organizations with which the author is associated. He gratefully acknowledges the many insightful comments of Dr. Werner Simon, Geneva.

**Patrick J. Flood** is a former U.S. Foreign Service Officer who devoted a substantial part of his career to human rights, refugee, and United Nations affairs. After retiring from the Foreign Service, he earned a doctorate in Political Science from the University of Massachusetts Amherst and began an academic career. His most recent publications are *The Effectiveness of U.N. Human Rights Institutions* (1998), a chapter on U.S. policy in the UN in *The United States and Human Rights: Looking Inward and Outward* (2000), and “Abortion and the Right to Life in Post-Communist Eastern Europe and Russia,” 30 *East European Quarterly* (June 2002). Dr. Flood has taught at the Budapest Institute of Graduate International and Diplomatic Studies, the University of Massachusetts Amherst, Elms College, and Western New England College. His current research interests encompass international humanitarian law, international human rights, multilateral institutions generally, and politics in Eastern Europe and Russia.



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# INTRODUCTION TO THE THREE-VOLUME WORK

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*John Carey*

These three volumes have been sent to the publisher at a troublesome time for international humanitarian law. War inevitably involves violations of the legal limits on its application (*jus in bello*) if not also of the legal limits on its commencement (*jus ad bellum*). And war, or the next thing to it, goes on, along the Line of Control in Kashmir, the northern and southern no-fly zones in Iraq, the Afghanistan/Pakistan border, the Philippines and Chechnya, to name a few. And the corrective structure erected by the enormous efforts of entities both governmental and non-governmental, the International Criminal Court (ICC), is harassed by the unremitting opposition of the United States government to jurisdiction over Americans.

At the same time, encouraging signs are also observed for the prospects of international humanitarian law. The first session of the ICC Assembly of States Parties has done its organizational work successfully. Those countries, ICC members or not, that have agreed not to extradite United States citizens to the ICC can expect to receive whatever U.S. military or other aid had been threatened with non-delivery if they failed to sign. The International Criminal Tribunal for Rwanda, like the Tribunal for the Former Yugoslavia, will be fortified with *ad litem* judges. Judges for the Special Court for Sierra Leone have been named. A tribunal for Khmer Rouge leaders will likely come into being once the remaining issues are resolved between Hun Sen and the United Nations. Dissatisfaction with the Ad Hoc Human Rights Tribunal in Indonesia may lead to the creation of a UN-sponsored court to try persons accused of atrocities in East Timor.

The 50th anniversary, August 12, 1999, of the signing of the four Geneva Conventions of 1949 was observed by the International Committee of the Red Cross (ICRC) with a Solemn Appeal. The nations and governments of the world were asked:

- to reject the idea that war is inevitable and to work tirelessly to eradicate its underlying causes;
- to demand of all those involved in armed conflicts, and all who are in a position to influence the course of such conflicts, that they

respect the essential humanitarian principles and the rules of international humanitarian law;

- to spare civilians the agony of war;
- to foster relations between individuals, peoples and nations on the basis of the principles that inspired the Geneva Conventions, namely respect for human dignity in all circumstances, compassion for those who suffer and solidarity.

Yet ICRC President Cornelio Sommaruga, while claiming that the conventions “have prevented untold suffering,” had to acknowledge that “the past 50 years have seen massacres, deportation, looting, rape and countless other atrocities.”<sup>1</sup>

Besides ceremonial observances of the 50th anniversary, two other significant events occurred on August 12, 1999. This was the effective date of the UN Secretary-General’s Bulletin declaring troops under UN command and control to be ruled by the conventions. This action seemed to bear out the statement of Judge Gabrielle Kirk McDonald, soon thereafter to leave the International Criminal Tribunal for the Former Yugoslavia (ICTY) after more than six years, that, “The last decade has seen the application of dormant humanitarian principles and laws in various fora.”<sup>2</sup>

August 12, 1999 was also the day when the Federal Republic of Yugoslavia (FRY) made public, at the UN, its 417-page White Book of evidence said to show crimes committed by NATO during its attack against Serbia the previous spring. FRY Ambassador Vladislav Jovanovic told the press that the book had been sent to the International Criminal Tribunal for the Former Yugoslavia at the Hague, along with much other evidence throughout the war, but that Prosecutor Louise Arbour, who admitted receiving numerous requests for action, had never committed herself.<sup>3</sup>

These two events show that, while recognition of international humanitarian law inches forward, the perception of apparent one-sided “victor’s justice” remains troublesome. As in any law-enforcement setting, justice not only must be done but must be seen to be done. “Victor’s justice” was not a new phenomenon even at the time of the Nuremberg and Tokyo trials. Dr. R. John Pritchard, an editor of this collection, in his exhaustive essay exploring the international trials on Crete near the end of the 19th century, describes how numerous Moslems were tried and some executed for their part in a massacre of Christians while no steps were taken against Christians for killing Moslems. Craig Etcheson, in projecting

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<sup>1</sup> ICRC, Communication to the Press No. 99-46, INFO-PRESS:190, dated August 12, 1999.

<sup>2</sup> ICTY Press Release JL/PI.S./425-E, <<http://www.un.org/icty/pressreal/p425-e.htm>>.

<sup>3</sup> <<http://www.un.org/News/briefings/docs/1999/19990812.YUGO2.BRF.html>>.

future prosecutions for Khmer Rouge suspects, speculates about the possibility of foreigners being prosecuted for their own misdeeds in that unfortunate land.

Dr. Pritchard's chapter, like others in this collection, was presented in an earlier form to a Panel on International Humanitarian Law at the Third Pan-European International Relations Conference, held in Vienna's Wirtschaftsuniversität in September 1998. Since the conference, other scholars like Mr. Etcheson have added their views on international humanitarian law to the present collection. Altogether, essays contributed by some 30 authors are included in the three volumes. At the beginning of each volume a separate introduction briefly notes the content of each essay included therein, while prefaces to each volume by Professor Anthony D'Amato provide the scholarly impressions of one of America's leading international law thinkers who has also represented a defendant before the International Criminal Tribunal for the Former Yugoslavia.

In choosing authors, we have tried to balance contributions from some of the most eminent authorities on international humanitarian law in our time with chapters by relative newcomers and others in mid-career. There is in that sense a continuity, a ray of hope that passes from generation to generation, a certainty that our concerns will be shared and will not again enter into a period of neglect like what we experienced in the aftermath of the immediate post-1945 attempts at enforcement. There is much that is new in our collection as well as reminders of long-standing truths and aspirations.

The pleasure of working with all the authors of the essays collected in the three volumes has been most gratifying. Special thanks are due to my co-editors, Dr. R. John Pritchard and Professor William V. Dunlap, as well as to Transnational Publishers for their painstaking editing and production. To build upon existing scholarly tradition, this work could be styled not just as *Liber Amicorum* but better as *Liber Amicorum Amicisque*.

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# INTRODUCTION TO VOLUME ONE—ORIGINS

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*John Carey*

A century after two separate international military tribunals convened by Great Britain, Italy, France, and Russia to work alongside a British war crimes court following violence between Greek Christians and Turkish Muslims in Crete, Dr. R. John Pritchard discusses the background to these proceedings. He observes their linkages to an initiative by the Tsar which led in the following year to the Hague Convention of 1899 and the first formal proposal by a Head of State for the establishment of an international criminal code backed up by a permanent International Court of Justice. Dr. Pritchard shows how this exercise, in what could be called “gunboat diplomacy,” at the end of the 19th century anticipated more recent attempts by the international community to make individuals internationally accountable for war crimes, genocide, and crimes against humanity.

If the history of international humanitarian law (IHL) consisted of buried artifacts, one of the archeologists digging for clues to the past would be Jane Garwood-Cutler, with her chapter on the British war crimes trials of suspected Italian war criminals in 1945–1947. She describes how these little-known proceedings, “with some legal scholars even discounting their existence . . . contain valuable lessons for those involved in international tribunals of the present day.”

The longest-surviving member of the American defense team in the Tokyo major war crimes trial, Carrington Williams, has provided us with the best personal memoir of the Tokyo Trial written by anyone who took part in those proceedings. His chapter contains a number of analytical elements that are of very great significance, much that is new and nuanced about the past, written by one who was very conscious of the perils of present challenges and future prospects. William reminds us that the quality and value of what we do in no small measure requires outstanding defense attorneys who can keep prosecutors up to mark. He also reminds us of what too many practitioners in IHL forget: when prosecutors or judges “get a result” by dishonest or inappropriate means, the whole endeavor is diminished in terms of its authority and enduring value. Finally, he serves as proof that there remains much to be learned by further research in these historical areas, that a good deal of recent scholarship on the historical events and legal issues that Tokyo and even Nuremberg were concerned about is woefully substandard and needs to be reexamined rather than regarded as settled.

Bohunka Goldstein provides an overview of the degree of implementation of IHL achieved by means of diplomacy, both official and non-governmental.

Another historical study is that of Professor Emeritus Howard Levie of the U.S. Naval War College, who traces the development of limits on how land warfare is fought, from Old Testament times to the present. He describes “that portion of the law of war on land which states adopted not solely to regulate warfare on land, but to make it less horrendous for the average person, military or civilian.” Levie describes steps seeking to control measures such as bacteriological and toxin weapons, anti-personnel land mines, fire, dum-dum bullets, poison gas, and chemical weapons.

Professor Alfred P. Rubin of the Fletcher School of Law and Diplomacy applies an acid test to “current legal theories resting on an asserted universal jurisdiction in the organs of the international community,” which he calls “the product of good-hearted thinking [which] cannot work as expected in the world of affairs.”

Long-time ICRC official and scholar Michel Veuthey, after tracing the evolution of IHL from Solferino to Kosovo, concludes that the base of support for the 1949 Geneva Conventions must be broadened to include the media, artists, teachers, psychologists, and psychiatrists as well as philosophers and spiritual leaders.

While William Schabas provides new insights into the dark subject of genocide, Alfred de Zayas writes on the scourge of “ethnic cleansing,” describing the emerging “hard law” and “soft law” jurisprudence as well as implementable remedies. After examining the record of various international mechanisms for protecting individuals, retired U.S. Foreign Service Officer Patrick J. Flood concludes that, for now, ad hoc criminal tribunals have shown themselves to be effective.

This volume does not include chapters on other origins or developments in IHL such as the trial of Philip von Hagenbach by an Imperial Court of the Holy Roman Empire, post-First World War trials, post-Second World War trials in Europe, or dozens of other situations in this and the last century raising IHL questions in various parts of the world. All of these, and numerous other subjects, certainly deserve attention, but we have focused on just a few areas knowing that many of these others have already received a great deal of attention and that still others among them remain neglected.

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## FOREWORD

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This volume, *Origins*, is the first of three in a collection of original essays, each of which makes an important contribution to our understanding of humanitarian law. Together the three books—“Origins,” “Challenges,” and “Prospects”—comprise a publications event of the first magnitude. It is a great honor for me to have been invited by co-editors John Carey, John Pritchard, and William Dunlap to write a foreword for each book.

Criminal excesses in warfare have been with us since Biblical times, as one of the essayists in this book reminds us. But today for the first time in human history, people of all nations are vocally demanding that war criminals be brought to justice. Their governmental leaders, with some reluctance, are beginning to respond to this demand. The recent Pinochet episode began with most of the world’s governments opposed to Spain’s attempt to extradite former Chilean President Augusto Pinochet from Great Britain to be prosecuted in Spain for crimes against humanity. But the popular reaction was so great that political leaders one by one began to express support for the idea of accountability for Pinochet. (His medical unfitness for trial eventually defeated the extradition attempt. But the important lesson for future heads of state who might preside over grave violations of humanitarian law—fear of travel abroad—is a significant additional deterrent resulting from the Pinochet case.)

Additionally, although governmental leaders were at first reluctant to support the International Criminal Tribunals for the Former Yugoslavia and Rwanda, they are now acknowledging the success of these tribunals and the huge popular support they have elicited. The new International Criminal Court has come into being. But it is actively opposed by the United States, whose civilian leaders are personally worried about the Pinochet precedent.

The American civilian leaders may be bucking the dynamics of history. The world public wants accountability after centuries of exploitation by their own self-interested leaders. Perhaps even more important is the other side of the coin of war-crimes prosecutions: that it is the most tangible present manifestation of increasing concern for human rights. Ordinary, innocent civilians are the primary victims of war crimes and crimes against humanity. Even though history has numerous examples of state abuse of their criminal apparatus to prosecute dissidents and persecute political opponents, that image is slowly being replaced by

a more benign one: the use of international tribunals to deter acts of violence against civilians and allow breathing room to civilians whose only “crime” is not to participate in, or to dissent from, the ruling elite’s ideological program.

International humanitarian law itself wasn’t always viewed benignly. Essayists in this book find origins of humanitarian law in military discipline and military codes of conduct. Even the watershed trials of the major Axis war criminals at Nuremberg and Tokyo were widely perceived in their day as punishment for completed crimes that were committed during the Second World War. But students today see a different aspect of those trials: the deterrence aspect. By punishing the violation of the human rights of noncombatants during the Second World War, the Nuremberg and Far Eastern tribunals contributed mightily to the development of victims’ rights. Similarly, the trial and conviction of Adolf Eichmann in 1961 for genocide—by a state that did not even exist at the time of Eichmann’s crimes—has come to be viewed not as an aberrant form of retroactive jurisdiction, but rather as an affirmation of the basic human right not to be injured or killed by a state for reasons of the victim’s nationality, ethnicity, race, or religion.

One might ask, however, if international humanitarian law is currently in the take-off stage, why do we want to pause and look back at its origins? Why, for example, do we find case studies in the present volume of the war crimes tribunals on the island of Crete in 1898 and of the long history of the development of limits on land warfare? First, a pragmatic historian might say that the important question is: what mistakes were made? If we can learn about them, then we are less likely to repeat them. Second, a political scientist might instead focus upon the successes of the past rather than the mistakes. She might say that post-war assessments and accountability for militarily unjustifiable excesses of war, if repeated over a number of wars, demonstrate that war has a logic of efficiency embedded within it: The idea is not to win a war at all costs, but to win it with a minimum amount of collateral damage. As political scientist Quincy Wright used to teach, there are two goals in every war: to win the war and to win the subsequent peace.

A third answer might be offered by a student of international law: that in a world divided into relatively autonomous states, certain rules of interstate cooperation rapidly emerge that serve the collective interests quite well. These rules, which we call international law, are basically the same today as they were thousands of years ago. Each application of the rule to a specific controversy helps to illuminate and clarify the meaning of the rule itself. Thus, in the area of international humanitarian law, we may look to some of the earliest manifestations—such as the case study of the war crimes tribunals in Crete in 1898—less as a precedent than as an application. Crete is more akin to a scientific experiment in war-crimes accountability than to a historical happenstance. In brief, the experience in Crete is relevant today precisely because it is an instantiation of interna-

tional law. Admittedly this viewpoint may appear to have metaphysical overtones, yet I don't know how else to describe it. I am sure that students of law who are familiar with the historical development of common law will appreciate its similarity to the development of international customary law. Each judge in a common-law case believes, whether metaphysically or not, that the decision reached is in substantial accordance with pre-existing law even if outside commentators might with some reason call some of those decisions cases of first impression.

I will be saying a little more about these matters in prefaces to the two other volumes in this collection, with references to the essays contained therein. For now (as they say) I turn the meeting over to John Carey, who will introduce the specific essays in this volume and tell us about the criteria for their selection.

Anthony A. D'Amato  
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Northwestern University  
Chicago, November 2002.



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